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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

PETITIONERS

v.

PAP'S A.M., T/D/B/A "KANDYLAND,"

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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11788

QUESTION PRESENTED

Did the Supreme Court of Pennsylvania, the court of last resort of the Commonwealth of Pennsylvania, improperly strike an ordinance of the City of Erie which fully comports with the principles articulated in *Barnes v. Glen Theatre, Inc.*, thereby willfully disregarding binding precedent in violation of the Supremacy Clause at Article VI, Clause 2 of the Constitution of the United States?

PARTIES

All parties to the proceeding before the Supreme Court of Pennsylvania are parties to this petition.

Appellants: The City of Erie, a municipal corporation organized under the provisions of the Third Class City Code of the Commonwealth of Pennsylvania, maintaining its principal place of business at 626 State Street, Erie, Pennsylvania, its mayor and named present and former members of City Council

Appellee: Pap's A.M., a Pennsylvania corporation trading and doing business as "Kandyland," maintaining its principal place of business at 4004 Peach Street, Erie, Pennsylvania

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES ii
TABLE OF AUTHORITIES iii
OPINIONS AND ORDERS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 9
CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) . . 4, 10

New York v. Ferber, 458 U.S. 747 (1982) 12

Pap's A.M. v. City of Erie, 674 A.2d 338 (Pa. Commw. 1996) 6, 7

Pap's A.M. v. City of Erie, 688 A.2d 168 (Pa. 1997) . . 7, 9

Pap's A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998) 7, 8, 10, 11, 14, 15

Planned Parenthood v. Casey, 505 U.S. 833 (1992) . . . 15

Rappa v. New Castle County, 18 F.3d 1043 (1994) . 12, 13

United States v. O'Brien, 391 U.S. 367 (1968) 11

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. amend. I 3

U.S. CONST. art. VI, cl. 2. 3

28 U.S.C.S. § 1257(a) (Law. Co-op. 1988) 2

IN THE
SUPREME COURT OF THE UNITED STATES
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THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,
PETITIONERS

v.

PAP'S A.M., T/D/B/A KANDYLAND,
RESPONDENT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in *Pap's A.M. t/d/b/a Kandyland v. The City of Erie, Pennsylvania, et al.*, __ Pa. __, 719 A.2d 273 (1998).

OPINIONS AND ORDERS BELOW

The opinion of the Court of Common Pleas of Erie County, Pennsylvania denying Pap's A.M.'s request for preliminary injunction, with accompanying order, is reported at 78 Erie 6 (January 13, 1995), and is reproduced at Appendix B to this petition. The opinion of the Court of Common Pleas of Erie County, Pennsylvania granting a permanent injunction and declaring Ordinance 75-1994 unconstitutional, with accompanying order, is reported at 78 Erie 17 (January 27, 1995), and is reproduced at Appendix C to this petition.

The opinion of the Commonwealth Court of Pennsylvania with accompanying order is reported at 674 A.2d 338 (1996) and is reproduced at Appendix D to this petition. The order of the Supreme Court of Pennsylvania granting limited review of the decision of the Commonwealth Court is reported at 547 Pa. 9, 688 A.2d 168 (1997) and is reproduced at Appendix E to this petition.

The opinion of the Supreme Court of the Commonwealth of Pennsylvania and concurring opinion are reported at ___ Pa. ___, 719 A.2d 273 (1998) and are reproduced at Appendix F to this petition.

JURISDICTION

The Supreme Court of Pennsylvania, the highest court of the Commonwealth, rendered its opinion and order on October 21, 1998.

Jurisdiction is vested in the United States Supreme Court by 28 U.S.C.S. § 1257(a) (Law. Co-op. 1988), as the validity of a municipal enactment is questioned as repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, which provides that

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Supremacy Clause of the Constitution of the United States of America, which provides that

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

STATEMENT OF THE CASE

This action originated as a Complaint in Equity before the Court of Common Pleas of Erie County, Pennsylvania, filed October 14, 1994. The complaint named as defendants The City of Erie, Pennsylvania, its mayor Joyce A. Savocchio, and five members then seated on the City Council. Plaintiff below Pap's A.M. identified itself as a Pennsylvania corporation maintaining a place of business within the City of Erie, and described its business as "an establishment which provides nude dancing." [Complaint in Equity, Appendix A at 1a, 3a].

Pap's A.M., or "Kandyland," sought to enjoin enforcement of City of Erie Ordinance 75-1994, along with a declaration that the ordinance is invalid and unenforceable.

Kandyland further sought to enjoin the City of Erie from enacting similar legislation in the future. [Appendix A at 4a]. In a second count, Kandyland purported to bring an action under 42 U.S.C.S. § 1988, seeking damages, counsel fees and costs of litigation. [Appendix A at 4a-5a].

The challenged ordinance was enacted by a majority vote of City Council on September 28, 1994 and was signed into law by Mayor Savocchio on September 30, 1994. The ordinance replaced an 1866 version of Article 711 of the Codified Ordinances of the City of Erie, titled *Indecency and Immorality*, and replaced it with a new article titled *Public Indecency*.[1] The text of Ordinance 75-1994 was closely modeled on the text of the ordinance reviewed in *Barnes v. Glen Theatre, Inc.*[2]

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[1] The new Article 711 provides that a person commits a summary offense by doing any of the following acts knowingly and intentionally in a public place:

a. engaging in sexual intercourse
b.– engaging in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
c. appearing in a state of nudity
d. fondling his/her own genitals or the genitals of another person

"Nudity" and "public place" are defined terms. Children under ten years of age and women breastfeeding infants are excepted from the scope of the ordinance. [Ordinance 75-1994, appended to the Complaint, Appendix A at 8a-9a].

[2] 501 U.S. 560 (1991)

Kandyland's complaint challenged the ordinance on federal and state constitutional grounds. Kandyland averred that the ordinance violates the freedoms of speech and expression guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article I, § 7 of the Constitution of the Commonwealth of Pennsylvania; that the working of the ordinance constitutes a taking under both the United States and Pennsylvania Constitutions; that the ordinance violates the right to the equal protection of the laws guaranteed by the United States and the Pennsylvania Constitution; that the ordinance is overbroad; and that the ordinance is pre-empted by the laws of the Commonwealth of Pennsylvania. [Appendix A at 3a-4a].

The Court of Common Pleas denied Kandyland's petition for preliminary injunction by Order issued October 21, 1994. [Appendix B at 19a]. Following a hearing on December 21, 1994, a permanent injunction was granted. The trial court's Opinion and Order of January 18, 1995, declared Ordinance 75-1994 unconstitutional. [Appendix C at 20a-40a].

The City took an appeal as of right to the Commonwealth Court of Pennsylvania, the appropriate intermediate appellate court. Kandyland cross-appealed seeking counsel fees which had been denied by the lower court. The City challenged the lower court's declaration of constitutional invalidity and challenged Kandyland's standing to bring a claim under the First Amendment. The City further took issue with the lower court's failure to place a limiting construction on the ordinance.[3]

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[3] Challenges were also brought on the issue of state law pre-emption of the ordinance and to the trial court's failure to rule on immunity issues.

The Commonwealth Court's opinion and order issued on March 27, 1996. That court analyzed the *Barnes* decision under the framework set forth in *Marks v. United States* and concluded that Mr. Justice Souter's opinion articulates the holding of *Barnes*.[4] The Commonwealth Court interpreted the *Barnes* decision as holding that "an ordinance regulating speech can survive scrutiny if it satisfies the test in *O'Brien*, and is designed to prevent secondary effects associated with adult entertainment."[5] Having so stated the rule of law, the Commonwealth Court concluded that Ordinance 75-1994 does not violate rights guaranteed to Kandyland by the First Amendment.[6]

Turning to the overbreadth issue, the Commonwealth Court examined the Sixth Circuit's opinion in *Triplett Grille*. The court noted the obligation of a state court interpreting a state statute to construe the statute to avoid constitutional

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4 When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments in the narrowest grounds.'. . . Applying the *Marks* rule, Justice Souter's opinion articulates the holding of the Court since it shares with the majority of the Justices a common underlying approach and, since Justice Souter ruled on the narrowest ground, his concurrence therefore is the law."

Pap's A.M. v. City of Erie, 674 A.2d 338, 343 (Pa. Commw. 1996)[citations omitted].

5 674 A.2d at 343, citing *Barnes*, *United States v. O'Brien*, 391 U.S. 367 (1968) and *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994).

6 674 A.2d at 344.

problems where the statute as drafted is amenable to a limiting construction.[7] The Commonwealth Court expressly interpreted and limited the ordinance to reach conduct, not expression, and held that the ordinance is not facially overbroad.[8]

The Supreme Court of Pennsylvania granted review limited to two issues: whether Ordinance 75-1994 violates the rights to free speech and expression guaranteed by the Constitutions of the United States and of Pennsylvania, and whether the ordinance is fatally overbroad.[9] The court heard argument on September 16, 1997 and rendered its opinion on October 21, 1998. At the time of argument the Pennsylvania Supreme Court had only six justices seated. Madame Justice Newman did not participate in this decision. Accordingly, only five justices heard and decided the appeal. Three justices joined in the opinion of the court; two joined in a concurring opinion.

The Pennsylvania court cited a majority in *Barnes* as holding that nude dancing is an expressive act entitled to "some quantum of protection under the First Amendment."[10] From there, however, the Pennsylvania court freely departs from and disregards *Barnes*. Characterizing the opinion as "hopelessly fragmented," a "hodgepodge of opinions," the Pennsylvania court made fleeting reference to this Court's

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7 674 A.2d at 346, citing *New York v. Ferber*, 458 U.S. 747 (1982).

8 *Id.* at 346.

9 *Pap's A.M. v. City of Erie*, 688 A.2d 168 (1997)

10 *Pap's A.M. v. City of Erie*, 719 A.2d 273, 276 (Pa. 1998).

decision in *Marks v. United States* before determining that the *Marks* analysis does not afford binding precedential value to any opinion in *Barnes*.[11]

The Pennsylvania court thus "determined that there is no United States Supreme Court precedent which is squarely on point," in knowing disregard of *Barnes*. The court then undertook *de novo* analysis of the ordinance.[12]

The Pennsylvania court rejected the argument that Ordinance 75-1994 is content-neutral. On that basis, the court went on to apply strict scrutiny analysis, as is appropriate for a content-based enactment. The Pennsylvania court found a compelling governmental interest in deterring sex crimes. The ordinance failed, nonetheless, on the court's holding that it is not narrowly tailored to meet the compelling interest.[13] The court declined to "re-draft the ordinance" by subjecting it to a limiting construction. Rather, the court struck the portions prohibiting public nudity.[14]

The Pennsylvania court described Ordinance 75-1994 as "strikingly similar" to the Indiana statute at issue in *Barnes*.[15] The original *Barnes* ordinance, under the limiting construction imposed by the Supreme Court of Indiana, was upheld by this Honorable Court. No attempt was made to

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11 719 A.2d at 278.

12 *Id.*

13 *Id.* at 279-280.

14 *Id.* at 280-281.

15 *Id.* at 277.

distinguish *Barnes*; rather, the Pennsylvania court refused to acknowledge *Barnes* as binding precedent.

The Pennsylvania court could have interpreted the Pennsylvania constitution as giving more protection to the expressive conduct at issue than does the United States Constitution. The court did not do so. To the contrary, the court decided a First Amendment question in a fashion directly contrary to relevant precedent of this Honorable Court. The Pennsylvania Supreme Court has thus committed manifest reversible error by knowingly disregarding the precedent of *Barnes v. Glen Theatre*.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Pennsylvania decided the "Kandyland" case in derogation both of the principle of federalism as stated by the Supremacy Clause and of the doctrine of *stare decisis*. The Pennsylvania court granted limited review of the intermediate appellate court's decision. The nature of the controversy is plainly stated by that court's Order of January 28, 1997:

> I. Whether the Erie City Ordinance is unconstitutionally overbroad.
>
> III. Whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the Pennsylvania Constitution.[16]

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16 688 A.2d 168 (1997).

The ordinance prohibited four specific acts. Kandyland challenged only the prohibition of appearing in a public place in a state of nudity.

The Pennsylvania court began its analysis by stating a rule of law properly derived from this Honorable Court's decision in *Barnes v. Glen Theatre*. The court cited *Barnes* for the proposition that nude dancing is expressive conduct and, as such, enjoys a measure of protection under the First Amendment.[17] From there, however, the Pennsylvania court declined to "cobble together a holding out of a fragmented decision."[18] It is from that point in the opinion that the Pennsylvania court throws over the well-settled doctrine of *Marks v. United States* and goes on to discard *Barnes*.

After dismissing *Barnes* as at best "instructive,"[19] the Pennsylvania court grounds its decision firmly on the *Barnes* dissent. Justice White dissented in *Barnes* on the basis of his conclusion that the *Barnes* ordinance is not-content neutral.[20] The Pennsylvania court opined that Ordinance 75-1994, modeled on the *Barnes* ordinance, is also content-based. Accordingly, the Pennsylvania court went on to analyze Ordinance 75-1994 under strict scrutiny. The court correctly stated the standard for strict scrutiny, and then again looked to the dissent in *Barnes* to find that Ordinance 75-1994 is not narrowly tailored to meet the conceded compelling governmental interest. The Pennsylvania court provided

17 719 A.2d at 276.

18 *Id.* at 278.

19 *Id.* at 278.

20 501 U.S. at 592.

samples of restrictions which it would view as content-neutral and therefore not subject to strict scrutiny, again from the *Barnes* dissent.[21]

The Pennsylvania court committed fundamental error by analyzing Ordinance 75-1994 under strict scrutiny. It is well settled that expressive conduct is not entitled to full First Amendment protection. Where the conduct has both speech and non-speech elements, incidental limitations on First Amendment freedoms may be tolerated. *United States v. O'Brien*[22] provides the correct analytical framework. The *O'Brien* test permits some burden on expressive conduct where the burden is justified by a "sufficiently important governmental interest."[23]

The Pennsylvania court expended its efforts solely on disagreeing with the result in *Barnes*. This Honorable Court has previously addressed the respective roles of state and lower federal courts in federal constitutional analysis.

> While the construction that a state court gives a state statute is not a matter subject to our review . . . this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents,

21 719 A.2d at 279-280.

22 391 U.S. 367 (1968).

23 391 U.S. at 376-377.

> as well as state court decisions giving the Constitution too little shrift.[24]

Reasonable people may respectfully disagree with the plurality in *Barnes*, and wholeheartedly embrace the strictest construction of the First Amendment. The City of Erie, in enacting Ordinance 75-1994, made a strong statement of deference to "the fundamental constitutional guarantees of free speech and free expression."[25] The ordinance was passed in reliance on the result of *Barnes*, upholding the restriction on total nudity in a public place. The result of *Barnes* is clearly the subject of thoughtful and serious disagreement.

Nonetheless, disagreement with the outcome of a case does not give a lower court license to disregard it. The Court of Appeals for the Third Circuit has been required to apply the *Marks* analysis in a different context. The Circuit Court wrote

> The principal objective of this *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent.[26]

The Third Circuit went on to cite the Court of Appeals for the D.C. Circuit for the proposition that some Supreme Court

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[24] *New York v. Ferber*, 458 U.S. 747, 767 (1982).

[25] Ordinance 75-1994, Appendix A at 7a.

[26] *Rappa v. New Castle County*, 18 F.3d 1043 (1994), quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3d Cir. 1991).

decisions simply will not yield a controlling principle.[27]

The Pennsylvania Supreme Court undertook a reasoning process closely parallel to that of the D.C. Circuit, which was embraced by the Third Circuit in its analysis of *Metromedia, Inc. v. San Diego*[28] in *Rappa*. The Third Circuit described *Metromedia* as "a badly splintered plurality opinion which has arguably been undermined by the recent decision in *Cincinnati v. Discovery Network*."[29] Still, notwithstanding the frailty of *Metromedia* as precedent, the Third Circuit held that it was bound by *Metromedia*'s result.

The Third Circuit determined that if the legislation in question in *Rappa* was substantially the same as the ordinance in *Metromedia*, the Circuit was required to treat it in the same fashion as the *Metromedia* ordinance and strike it down.[30] It is at that point that the Pennsylvania court also parts company with the Third Circuit. The Circuit went on to distinguish the subject provision from that in *Metromedia*. The Pennsylvania court freely acknowledged the "striking similarity" between Indiana's statute and the City of Erie's Ordinance 75-1994. It simply chose to act upon its disagreement with the result in *Barnes* by striking the salient portions of Erie's ordinance.

In a matter of federal constitutional analysis, the

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[27] *Rappa* at 1058, quoting *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*).

[28] 453 U.S. 490 (1981)

[29] *Rappa* at 1047.

[30] *Rappa* at 1061.

Pennsylvania Supreme Court stands in no different position than do the Circuit courts. If the Pennsylvania court declares itself unbound by a directly relevant decision of the United States Supreme Court on a federal question, then there is no order or predictability in the law. A court may on occasion be compelled to rule against the personal preferences or even the deeply-held convictions of its justices. The three judges who here comprised a majority of the Pennsylvania Supreme Court may disagree with *Barnes*. They may find nothing whatsoever objectionable about fully-nude barroom performances, or may be appalled by them but hold the First Amendment dear. Personal values or opinions are not, however, a proper basis for a judicial determination. Our courts are bound by precedent, whether that precedent is agreeable to the jurists or not. Indeed, the concurring opinion of the Pennsylvania Supreme Court voiced discomfort with the majority's analysis and result.

> [B]ecause a majority of the United States Supreme Court has upheld the constitutionality of a virtually identical ordinance under the First Amendment to the Federal Constitution, and because this Court is bound by the United States Supreme Court's interpretations of the Federal Constitution, I must disagree with the majority's conclusion that the provisions of the ordinance at issue fail under the First Amendment to the Federal Constitution.[31]
>
> . . . .
>
> I believe the majority herein strains to find discord in *Barnes* where none exists. In so doing, the majority circumvents binding United States Supreme Court precedent.[32]

Justice O'Connor's discussion of the doctrine of *stare decisis* sets a high standard, placing the burden of the very legitimacy of the judicial system on "legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[33]

The Pennsylvania Supreme Court also labors under that burden. If indeed the *Barnes* decision is improvident, or has left the lower courts grasping for guidance which is elusive under *Barnes*, it is for this Honorable Court to impose the needed clarity.

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[31] 719 A.2d 273 at 281.

[32] *Id.* at 282.

[33] *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992).

CONCLUSION

For the foregoing reasons, Petitioners request that this Honorable Court grant this petition for certiorari, and either remand this case for reconsideration under the binding precedent of *Barnes v. Glen Theatre, Inc.* or set the case for briefing and argument.

Respectfully submitted,

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JANUARY 1999

APPENDICES

APPENDIX A

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

COMPLAINT IN EQUITY

AND NOW, comes the above-named plaintiff, PAP'S A.M. t/d/b/a KANDYLAND, by their attorneys, AMBROSE, FRIEDMAN and WEICHLER, and files the following as their complaint:

I. COUNT ONE

PAP'S A.M. t/d/b/a KANDYLAND v. THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities

1. The plaintiff, Pap's A.M., is a Pennsylvania Corporation trading and doing business as Kandyland with its principal place of business located at 1402 State Street, Erie, Pennsylvania 16501.

2. The defendant City of Erie is a Third Class City incorporated under the laws of the Commonwealth of Pennsylvania with offices located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

3. The defendant Joyce A. Savocchio is the mayor of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

4. The defendant Chris E. Maras is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

5. The defendant Mario S. Bagnoni is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

6. The defendant Robert C. Brabender is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

7. The defendant Denise Robison is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

8. The defendant James N. Thompson is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

9. On or about September 28, 1994 City Council passed Ordinance No. 75-1994 by a vote of 7-2. Each of the above-named defendant members of council voted in favor of the ordinance.

10. On or about September 30, 1994 the ordinance was approved by the defendant Mayor Joyce A. Savocchio. A copy of the ordinance is attached hereto as Exhibit A.

11. The plaintiff maintains an establishment which provides nude dancing within the requirements of the laws of the Commonwealth. The plaintiff does not serve alcoholic beverages on its premises. The ordinance which has been adopted and which is scheduled to become effective on October 20, 1994 will prevent the plaintiff and its employees from exercising their rights under the First Amendment to the United States Constitution and Article I Section 7 of the Pennsylvania Constitution and will furthermore preclude the plaintiff's patrons from viewing protected speech. The ordinance will furthermore cause the plaintiff to either close its business or suffer severe economic consequences.

12. The plaintiff avers that the ordinance is unconstitutional and illegal and should be invalidated for the following reasons:

a.) The ordinance violates the First and Fourteenth Amendments to the United States Constitution which guarantee freedom of expression;

b.) The ordinance violates Article 1 Section 7 of the Pennsylvania Constitution which guarantees freedom of expression;

c.) The ordinance is substantially overbroad;

d.) The ordinance violates the laws of the Commonwealth of Pennsylvania in that state law preempts the ordinance;

e.) The ordinance constitutes a taking of the plaintiff's property without just compensation in violation of the Pennsylvania and United States Constitutions;

(note: there is no f.) in the original document)

g.) The ordinance and its purported enforcement violates the plaintiff's right to equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 26 of the Pennsylvania Constitution.

WHEREFORE, the plaintiff respectfully requests that this Court enter a declaratory judgment declaring the ordinance unconstitutional, illegal and unenforceable. The plaintiff further requests that the Court enjoin the defendants from enforcing said ordinance and furthermore from passing and/or enforcing similar ordinances which are in violation of the United States and Pennsylvania Constitutions and the laws of this Commonwealth. The plaintiff further requests that this Court grant any other relief which this Court deems just and appropriate.

COUNT II.

PAP'S A.M. t/d/b/a KANDYLAND v. CITY OF ERIE

1. The Plaintiff hereby incorporates by reference numbers 1 through 11 above as though fully set forth herein.

2. The defendant City of Erie through its officials

is acting under color of state law in enacting and enforcing Ordinance 75-1994.

3. The actions of the City of Erie violate the constitutional rights of the plaintiff.

4. The City of Erie is liable to the plaintiff for damages, counsel fees and expenses pursuant to 42 U.S.C. sec. 1988.

WHEREFORE, the plaintiff respectfully requests this Court to award damages in an amount in excess of $20,000.00 together with counsel fees, expenses and appropriate interest and any other relief which this Court deems just and appropriate.

Respectfully submitted,

AMBROSE, FRIEDMAN and WEICHLER

By s/Philip B. Friedman
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Supreme Court I.D. No. 27554

Dated: 10/19/94

EXHIBIT "A", COMPLAINT IN EQUITY

CITY COUNCIL OF ERIE

INTRODUCED BY: MR. THOMPSON

COUNCIL FILE NO. 14,482
OFFICIAL ORDINANCE NO. 75-1994

AN ORDINANCE

Amending Article 7 of the Codified Ordinances of the City of Erie (General Offenses) by repealing the present Article 711 - Indecency and Immorality, and substituting a new Article 711 to be titled Public Indecency, prohibiting certain conduct in public places, providing definitions relating thereto, and providing penalties for the violators thereof, including fines, imprisonment, and declaration of public nuisance, as appropriate.

WHEREAS the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity; and

WHEREAS, Council, by various enactments of General Offenses of Article 711 and 112, as well as amendments to the Zoning Ordinance, has expressed its intention to limit or restrict such lewd immoral activities, to

provide penalties for violations thereto and, in appropriate cases to declare the locations of such activities to be a public nuisance subject to abatement; and

WHEREAS, Council is fully aware of and fully respects the fundamental constitutional guarantees of free speech and free expression and realizes that restrictions of such freedoms must be carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare; and

WHEREAS, over the years, various statutes and court interpretations have been enacted and decided, which compel periodic re-evaluation and revision of City ordinances and regulations; and

WHEREAS, the current Article 711, Indecency and Immorality, the provisions of which date back as far as the year 1866, is outdated in part and unnecessary in part, and should be entirely replaced with new language consistent with current state and federal law; and

WHEREAS, Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in Barnes vs. Glen Theatre Inc., et al 111 Sup. Ct. 2456 (1991), for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

NOW THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY OF ERIE, PENNSYLVANIA AS FOLLOWS:

Section 1. Article 711 of the Codified Ordinances of the City of Erie (Indecency and Immorality) is hereby repealed and replaced in its entirety by a new Article 711, entitled Public Indecency, to read as follows:

1. A person who knowingly or intentionally, in a public place:

a. engages in sexual intercourse

b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

c. appears in a state of nudity, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquets (sic) halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection l(c) shall not apply to:

a. Any child under ten (10) years of age; or

b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

5. In addition to the specific penalties provided in this ordinance, it is hereby declared that any building, portion of a building, or enclosed place regularly used for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Commonwealth of Pennsylvania for the abatement of public nuisances, including, but not limited to the procedures set forth in Article 712 of the Codified Ordinances.

6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a

court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

7. PENALTY - Whoever violates this ordinance, either by commission of a public indecency, or by the promotion or maintenance of public indecency as property owner, proprietor or manager of a business, shall be guilty of a summary offense, and, upon conviction, shall be sentenced to pay a fine of not more than $1,000, or be imprisoned for not more than 90 days, or both. Each day such violation continues is a separate offense.

Section 2. That all Ordinances and parts thereof conflicting herewith be and the same are hereby repealed.

Section 3. That this Ordinance shall become effective twenty days after final passage and approval by the Mayor.

We do hereby certify that the above ordinance was finally passed by the City Council on September 28, 1994.

SIGNED September 28, 1994

Attest: September 28, 1994

Chris E. Maras
President of Council

James Klemm
City Clerk

THIS ORDINANCE APPROVED THIS 30th DAY OF September, 1994.

Joyce A. Savocchio
Mayor

APPENDIX B

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

Appearances: Philip B. Friedman, Esquire, for Plaintiff
Gregory A. Karle, Esquire/Gerald J. Villella, Esquire, for Defendants

OPINION

Levin, J.

This matter is before the court on Pap's A.M. t/d/b/a Kandyland's (hereinafter referred to as "Kandyland") request for a preliminary injunction requesting the court to enjoin defendants from enforcing an ordinance passed by the Erie City Council on September 30, 1994. The relevant facts surrounding the issue have been agreed upon by the parties. Namely, Pap's A.M. is the owner of a business named

Kandyland. The business is located within the city limits in a commercial area. Kandyland provides adult entertainment to its patrons in the form of nude dancing. Alcoholic beverages are not served on the premises; however, patrons are allowed and are invited to bring alcohol into the establishment.

On September 28, 1994, the City Council enacted Ordinance No. 75-1994.[1] In relevant part, the ordinance reads:

> 1. A person who knowingly or intentionally, in a public place:
>
> a. engages in sexual intercourse
>
> b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
>
> c. appears in a state of nudity, or
>
> d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.
>
> 2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any

[1] There are no allegations that the City Council failed to abide by 53 P.S. §36001, et seq. in the passage of Ordinance 75-1994.

> part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
>
> 3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.
>
> 4. The prohibition set forth in subsection 1(c) shall not apply to:
>
> a. Any child under ten (10) years of age; or
>
> b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.
>
> 5. In addition to the specific penalties provided in this ordinance, it is hereby declared that any building, portion of a building, or enclosed place regularly used

> for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Commonwealth of Pennsylvania for the abatement of public nuisances, including, but not limited to the procedures set forth in Article 712 of the Codified Ordinances.

The ordinance was signed by Mayor Savocchio on September 30, 1994, and is scheduled to take effect on October 20, 1994. On October 14, 1994, Kandyland filed a complaint in equity against the defendants. Shortly thereafter, on October 17, 1994, plaintiff filed for a preliminary injunction. Argument was held regarding the preliminary injunction on October 19, 1994, and this court temporarily enjoined the defendants from enforcing Ordinance 75-1994 pending its decision on the instant request for a preliminary injunction.

When determining whether a preliminary injunction should be granted, the court must consider the following standard: (1) is the injunction necessary to prevent immediate and irreparable harm not compensable in damages; (2) would greater harm result from denying the injunction than from granting it; (3) is the plaintiff's right to relief clear (a likelihood of success on the merits); and (4) will the status quo be restored if the injunction is granted. Com. v. Danny's Bookstore, 155 Pa. Cmwlth. 281, 625 A.2d 119 (1993) citing Norwood A. McDaniel Agency v. Foster, 117 Pa. Cmwlth. 227, 543 A.2d 155 (1988).

First, before a preliminary injunction can be entered, the plaintiff must show that such injunction is necessary to prevent immediate and irreparable harm not compensable in damages. Kandyland's argument, and one which the court

accepts, rests on the principle that nude dancing is afforded constitutional protection under the First Amendment to the U.S. Constitution. See generally, Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249 (N.D. Ohio 1993). Generally speaking, where violations of constitutional rights are alleged, a further showing of irreparable injury may not be required if more than merely money is at stake. Milwaukee County Pavers Ass'n. v. Fiedler, 707 F. Supp. 1016, as modified in 710 F. Supp. 1532 (W.D. Wis. 1989). Thus, the court finds Kandyland has met the first requirement necessary to allow entry of a preliminary injunction.

The second criteria requires that the preliminary injunction maintain the status quo. There is no doubt that issuing a preliminary injunction would satisfy this requirement for status quo would be maintained. Kandyland's business could proceed as usual, as there was no such prohibition prior to Ordinance 75-1994.[2]

The third prong to be established is whether the plaintiff's right to relief is clear, or otherwise expressed, whether plaintiff is likely to succeed on the merits of the case. This extremely high standard is required to justify the entry of a preliminary injunction, because a preliminary injunction is an extraordinary remedy and must be exercised only with extreme caution. After all the arguments presented before it, the court finds this to be the most perplexing issue to resolve. The U.S. Constitution and the Bill of Rights form the cornerstones of our government. Unfortunately,

---

[2] Ordinance 75-1994 is intended to repeal Article 711 of the Codified Ordinances of the City of Erie. Article 711 specifically addresses Houses of Ill Fame, Prostitution, Use of Vehicle for Immoral Purposes, and Obscene Writings on Wall. The recently enacted Ordinance 75-1994 addresses public indecency.

sometimes the rights afforded by the Bill of Rights are not defined with sufficient specificity. As noted by the Honorable Justice Benjamin Cardozo, "[b]ills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise." M. E. HALL, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (1947).

The Pennsylvania courts have not been directly presented with the constitutionality of ordinances as enacted in the City of Erie. The parties have cited two major cases in support of their respective positions. Not coincidentally, all the ordinances in question are almost identical to the ordinance enacted in Barnes, infra. On Kandyland's side is Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249 (N.D. Ohio 1993). Triplett is currently on appeal to the Sixth Circuit. In Triplett, the District Court held that the ordinance enacted by the City of Akron was overbroad and violated the First Amendment right to free speech and expression. Further, the District Court found that the Akron ordinance failed to consider any of the secondary effects of adult entertainment in the community.

The Triplett court relied upon Justice Souter's concurring opinion in Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991), in finding the Akron ordinance invalid. The Triplett court interpreted Justice Souter's opinion as the narrowest grounds available in analyzing the high court's plurality opinion. See Marks v. United States, 430 U.S. 188 (1977) cited in Triplett, supra. Justice Souter's concurrence centered on the secondary effects of adult entertainment. Justice Souter found the secondary effect argument to meet the criterion set forth in United States v. O'Brien, 391 U.S. 367 (1968).

Turning to the defendants' position, the court is directed to Barnes, supra, a plurality decision of the nation's highest court. The Barnes court applied the four-part test of O'Brien, supra, and determined the Indiana statute to be constitutional. Specifically, the court stated that (a) nude dancing is expressive conduct within the outer perimeters of the First Amendment, Id. at 2460, and (b) Indiana's public indecency statute is justified despite the incidental limitations on some expressive activity. The statute was viewed as within the constitutional powers of the powers of the state and one which furthers substantial governmental interests (protecting order and morality, Barnes at 2461). Further analyzing the O'Brien test, the court ruled that governmental interest is unrelated to the suppression of free expression, since public nudity is the prohibited act (whether or not it is combined with expressive activity). Finally, the restriction placed on the First Amendment freedom was found not to be greater than essential to further the governmental interest (the act of nude dancing and the messages it intends to convey are not being deprived, but rather the messages conveyed would be slightly less graphic). Barnes at 2463.

Given these two opposing positions, this court cannot state that plaintiff's right to relief is clear or that the plaintiff is likely to succeed on the merits of the case. On the basis of Triplett, the Erie ordinance may very well be invalid. However, Ordinance 75-1994 specifically enumerates the intentions of the legislature and the purpose for its enactment, thus providing the secondary effects argument Triplett lacks. The determination that the Akron statute is overbroad is not yet final, inasmuch as Triplett has been appealed to the Sixth Circuit. Barnes, on the other hand, upheld the statute as applied.

At this time, the issues of preemption and overbreadth

are not yet ripe for review, as the court's review is strictly limited to the question of the issuance of a preliminary injunction. With the plurality decision of the U.S. Supreme Court and the conflicting District Court decision in mind, the court cannot say the plaintiff's right to relief is clear. This is not to say with certainty that upon further hearing and argument, the ordinance will be found valid. This order is being entered without prejudice to Kandyland, after a full hearing, to seek a permanent injunction. In fact, the oar Kandyland will have to pull in a final hearing to obtain an injunction is much lighter than the one they must wield in obtaining a preliminary injunction. Also, the court agrees, upon the request of either party, to expedite this case and dispose of it as soon as possible after all pleadings are filed, testimony presented and arguments held.

The court, having found that plaintiff has not met the burden with respect to proving a clear right to relief, declines to address the fourth prong of the preliminary injunction standard, that being whether greater harm would result by denying the injunction than by granting it.

Finally, the court would like to note that it has considered all the case law presented on behalf of Kandyland. These cases, however, can be distinguished from the case sub judicia, both factually and/or in the relief they seek, and thus they lend little insight in the issue of a preliminary injunction.

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

ORDER

AND NOW, to-wit, this 21 day of October, 1994, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the plaintiff's request for preliminary injunction is denied.

s/ George Levin
George Levin, Judge

NOTICE WAS GIVEN TO EACH PARTY OR COUNSEL OF RECORD BY ORDINARY MAIL ON 10-21-94.

APPENDIX C

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

Appearances: Philip B. Friedman, Esquire, for plaintiff
Gregory A. Karle, Esquire/Gerald J. Villella, Esq., for defendants

OPINION

Levin, J.

Before the court at this time is plaintiff's request for a permanent injunction enjcining the City of Erie from enforcing Ordinance 75-1994.

Findings of Fact

1. The plaintiff is Pap's A.M. t/d/b/a Kandyland (hereinafter "Pap's A.M." or "plaintiff"), with a principal

place of business located at 1402 State Street, Erie, Pennsylvania.

2. The defendants are the City of Erie, Joyce A. Savocchio, Mayor, Chris E. Maras, Mario S. Bagnoni, Robert C. Brabender, Denise Robinson, and James N. Thompson, all members of the City Council for the City of Erie (hereinafter "the City" or "defendants").

3. Pap's A.M. is located in a commercial area of the city and provides adult entertainment to its patrons in the form of nude dancing.

4. Pap's A.M. does not serve alcoholic beverages; however, patrons are invited to and encouraged to bring such beverages into the premises.

5. On September 28, 1994, the City Council of Erie enacted Ordinance 75-1994. The Ordinance, in relevant part, reads as follows:

> NOW THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY OF ERIE, PENNSYLVANIA AS FOLLOWS:
>
> Section 1. Article 711 of the Codified Ordinances of the City of Erie (Indecency and Immorality) is hereby repealed and replaced in its entirety by a new Article 711, entitled Public Indecency, to read as follows:
>
> 1. A person who knowingly or intentionally, in a public place:

a. engages in sexual intercourse

b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

c. appears in a state of nudity, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance

halls, banquets [sic] halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection l(c) shall not apply to:

a. Any child under ten (10) years of age; or

b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

5. In addition to the specific penalties provided in this ordinance, it is hereby declared that any building, portion of a building, or enclosed place regularly used for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Commonwealth of Pennsylvania for the abatement of public nuisances, including, but not limited to the procedures set forth in Article 712 of the Codified Ordinances.

6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the

constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

7. PENALTY - Whoever violates this ordinance, either by commission of a public indecency, or by the promotion or maintenance of public indecency as property owner, proprietor or manager of a business, shall be guilty of a summary offense, and, upon conviction, shall be sentenced to pay a fine of not more than $1,000, or be imprisoned for not more than 90 days, or both. Each day such violation continues is a separate offense.

Section 2. That all ordinances and parts thereof conflicting herewith be and the same are hereby repealed.

Section 3. That this Ordinance shall become effective twenty days after final passage and approval by the Mayor.

A copy of the Ordinance in its entirety is attached to and made part of this opinion as Exhibit A.

6. The ordinance was approved by Mayor Savocchio on September 30, 1994, with an effective date of October 20, 1994.

7. On October 14, 1994, Pap's A.M. filed a complaint in equity requesting the court to enter a declaratory judgment declaring the ordinance unconstitutional, illegal and unenforceable. Furthermore, Pap's A.M. requested the court to enjoin the City from enforcing Ordinance 75-1994 and from passing and/or enforcing similar ordinances.

8. On October 17, 1994, Pap's A.M. filed for a preliminary injunction. This court heard argument on the matter on October 19, 1994. At that time, the City was temporarily enjoined from enforcing Ordinance 75-1994 until such time as the court rendered its decision.

9. At the argument held October 19, 1994, Pap's A.M. presented a videotape of the City Council meeting of September 28, 1994, the meeting at which the Ordinance was passed. Various members of City Council addressed the issue and stated numerous reasons for supporting the Ordinance. Among the reasons set forth are the following:

a. The Ordinance had full support of the Mayor, the District Attorney, and the Police;

b. The Ordinance would help define and maintain community standards;

c. One night club was cited for lewd conduct by the Pennsylvania Liquor Control Board;

d. There is no right to indecency (akin to no right to gamble)

e. The ordinance would affirm the community standards as established by the City's founders;

f. Members of Council were elected to help formulate this community's standards;

g. Ordinances such as 75-1994 are not new or unlike any other community's.

h. The businesses affected by the Ordinance will stili be able to provide adult entertainment to its patrons although in a somewhat different form.

10. Upon the effective date of the Ordinance, performers of adult entertainment were required to wear "G-strings and pasties."

11. By order dated October 21, 1994, this court denied Pap's A.M.'s request for a preliminary injunction inasmuch as the court could not determine plaintiff's right to relief was clear.

12. The court convened a hearing on the permanent injunction on December 21, 1994.

13. At the final hearing held December 21, 1994, Bill Morton, a representative of the Erie Playhouse and Roadhouse Theater, was allowed to address the court (both parties agreed to allow Mr. Morton to speak before the court).

Mr. Morton spoke to the chilling effect Ordinance 75-1994 would have upon the theatrical community. He also noted that while he appreciated the City's assurances that theatrical groups were not subject to the Ordinance, the Ordinance as written imposes governmental standards in the community and is subject to variant interpretation.

14. The play "Equus," which featured frontal nudity, did appear in the City of Erie in October and November, 1994, after passage of the Ordinance.

Discussion

Before the court attempts to analyze the underlying facts of this case as they relate to the applicable law, the court would remind the parties of the purpose of this case. It is not to reveal the personal opinions of one man. If that were the case, since nude dancing does not meet with the court's approval, its task would be much easier, for the court would just concur with the City. Nevertheless, the role of this judiciary is not to question the wisdom of the actions of a legislative body. The court's responsibility is only to see that legislation passes constitutional muster. Finucan v. Pennsylvania Milk Marketing Bd., 136 Pa. Cmwlth. 272, 582 A.2d 1152 (1990).

One would hope modern society sees its judges as examining issues from all angles, balancing objectives among the various interests, applying fundamental principles neutrally, and seeking to attain a delicate balance between majority rule and the basic rights of the individual. Aharon Barak, Judicial Discretion (1989).

Initially, the court must address the City's allegation that Pap's A.M. lacks standing to challenge the Ordinance.

Traditionally, a person who is not adversely affected by the matter he seeks to challenge is not "aggrieved" and therefore has no standing to seek judicial review. American Booksellers Ass'n., Inc. v. Rendell, 332 Pa. Super. 537, 481 A.2d 919 (1984). This rule has, however, been modified for First Amendment issues. A litigant may challenge the validity of an ordinance on the grounds of overbreadth as it applies to persons not before the court. "The doctrine of overbreadth accords standing by reason of the chilling effect that a particular law might have upon the exercise of first amendment rights." Id. at 555, 481 A.2d 919 (1984). This is so because the very existence of the statute may cause others not before the court to refrain from constitutionally protected speech or expression. American Booksellers, supra, citing Broadrick v. Oklahoma, 413 U.S. 601 (1973); Doran v. Salem Inn Inc., 422 U.S. 922 (1975). Among other theories, plaintiff is challenging Ordinance 75-1994 on the basis of overbreadth. Thus, the court finds plaintiff to have standing in which to challenge the City's Ordinance. In addition, plaintiff has attained standing by the Ordinance itself. The Ordinance imposes penalties upon those who promote or maintain public indecency as a property owner, proprietor or manager of a business. Consequently, as the provider of nude adult entertainment, Pap's A.M. is aggrieved by the Ordinance upon enactment and enforcement of its provisions.

When a party challenges the constitutionality of an ordinance, he must prove the ordinance to be invalid. See, Dufour v. Maize, 358 Pa. 309, 56 A.2d 675 (1948); Patton v. Republic Steel Corp., 342 Pa. Super. 101, 492 A.2d 411 (1985). A legislative enactment enjoys a strong presumption of constitutionality and shall not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution. Patten, supra, citing In the Interest of Jones,

286 Pa. Super. 574, 429 A.2d 671 (1981); Kirk v. Unemployment Compensation Board of Review, 57 Pa. Cmwlth. 92, 425 A.2d 1188 (1981); Singer v. Sheppard, 33 Pa. Cmwlth. 276, 381 A.2d 1007 (1978). Plaintiff advances three theories in support of his argument that the ordinance is invalid. These are (1) the Ordinance violates the First Amendment of both the United States and Pennsylvania Constitutions (the freedom of expression); (2) the Ordinance is preempted by 18 Pa. C.S.A. §5903, the State Obscenity Statute; and (3) the Ordinance violates the equal protection and due process clauses of the federal and state constitutions. The most pivotal argument raised by plaintiff is that the Ordinance is overbroad.

The doctrine of overbreadth serves "to invalidate legislation so sweeping that, along with its allowable proscriptions, it also restricts constitutionally protected rights of free speech, press or assembly." Black's Law Dictionary, 1103 (6th ed. 1990). Although the precedential value of Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 Sup. Ct. 2456 (1991), has been highly debated in this case, both parties would agree the Barnes plurality stated nude dancing is expressive conduct within the outer perimeters of the First Amendment. Thus, it is entitled to First Amendment protection. Id. See also, Schad v. Borough of Mount Ephrain, 45 U.S. 61 (1981). The question then becomes to what degree the legislature may regulate the exercise of a constitutionally guaranteed right.

The parties have cited the court to various decisions in support of their respective positions and the court will address these in turn. In arguing that Ordinance 75-1994 is overbroad, Pap's A.M. requests the court to review Salem Inn Inc. v. Frank, 364 F.Supp. 478 E.D.N.Y., 1973 [sic], affirmed, 501 F.2d 18 (2nd Cir. 1974) affirmed in part and

reversed in part in Doran v. Salem Inn Inc., 422 U.S. 922 (1975) and Triplett Grille, Inc. v. City of Akron, No. 93-3418 (6th Cir. Nov. 1994). In Doran, the United States Supreme Court held a North Hempstead, New York, ordinance to be overbroad and in violation of the First and Fourteenth Amendments. The challenged ordinance made it unlawful for bar owners and others to permit waitresses, barmaids, and entertainers to appear in their establishment with breasts uncovered or so thinly draped as to appear uncovered. Id. at 924. The Supreme Court noted the ordinance not only applies to places which serve liquor, but to other establishments as well. The high court affirmed the grant of a preliminary injunction and adopted the District Court's finding that:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance.

Doran, 422 U.S. at 933, citing Salem Inn Inc. 364 F. Supp. at 483. After reviewing Doran, supra, it would appear the issue has clearly been decided. Unfortunately, this is not so. Doran was decided in 1975, 16 years prior to Barnes v. Glen Theatre, Inc. wherein the U.S. Supreme Court upheld an Indiana statute which provided the basis for the language in

Erie Ordinance 75-1994. In Barnes, Chief Justice Rehnquist applied the four-part test of United States v. O'Brien, 391 U.S. 367 (1968), in determining the statute to be valid, as applied.[1] The issue of overbreadth, as raised here, was not addressed by the Supreme Court in Barnes. The overbreadth argument was originally sustained in Barnes at the District Court level. Nevertheless, the Court of Appeals for the Seventh Circuit reversed this decision, citing previous litigation with respect to the statute in the Supreme Courts of Indiana and the United States as precluding such a challenge. Barnes at ____, 111 Sup. Ct. at 2459. The overbreadth doctrine has successfully been argued in Triplett Grille, Inc. v. City of Akron, No. 93-3418 (6th Cir. 1994) (hereinafter Triplett II). Although the facts giving rise to the enactment of an ordinance differ from the case at bar, the ordinances are virtually identical in what is prohibited. The Circuit Court thoroughly examined the Barnes decision and agreed with the District Court of Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249 (N.D. Ohio 1993) (hereinafter Triplett I), that Justice Souter's concurring opinion in Barnes offered the narrowest grounds upon which the decision rested. Therefore, it is this analysis which the courts must follow. Triplett II at 5.[2]

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[1] The four part test of United States v. O'Brien, supra, will uphold a government regulation if (1) it is within the constitutional power of the government, (2) it furthers an important or substantial government interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Barnes at ____, 111 Sup. Ct. at 2461.

[2] In Marks v. United States, 430 U.S. 188 (1977), it was held that where there is no clear majority of the court, the holding of the court may be viewed as the position taken by those who concurred in the judgment

Justice Souter's opinion in Barnes concentrated on the secondary effects (i.e., prostitution) motivation in passage of the ordinance. Justice Souter's concurrence recognized Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), wherein the U.S. Supreme Court held legislation seeking to combat the secondary effects of adult entertainment properly furthers the governmental interest of protecting society. Id. Justice Souter opined that a state may not be required to litigate secondary effects in every case. Legislatures may rely on outside studies to support the contentions of secondary effects. Barnes, supra. The District Court in Triplett I followed the secondary effects rationale, but determined the Akron ordinance invalid because there was no evidence the legislature considered secondary effects in the enactment of the ordinance. Triplett I, supra. This was not, however, the only basis on which the District Court invalidated the ordinance. The District Court went on to discuss the far-reaching nature of the ordinance and found:

> Inasmuch as adult entertainment such as nude dancing is afforded some degree of constitutional protection, it stands to reason that other types of artistic expression reached by the breadth of Akron's law will be afforded even greater First Amendment protection. The impact of Akron's law goes significantly beyond its only legitimate sweep, combatting the secondary effects of adult entertainment. Finally, it is highly improbable that an itinerant dance or theatrical company seeking to perform an artistic or cultural exhibition which included nudity would undertake the costly and time-consuming burden of federal litigation necessary to perform in Akron. For all of these reasons, Akron's ordinance is found to be substantially overbroad and plaintiff must be permitted to challenge the statute on behalf of others as well as on their own behalf. To hold otherwise will allow the City to chill valuable First Amendment speech.

Triplett I at 1257. On appeal to the Sixth Circuit, the District Court was affirmed. This affirmation came despite the Circuit Court's conclusion that the District Court erred in ruling the Akron ordinance, as applied, was unconstitutional on the basis that evidence of secondary effects was not present. The Circuit Court found the District Court has placed a burden of proving affirmative evidence of secondary effects on the City when in fact Justice Souter's opinion in Barnes does not impose such a burden. Triplett II, supra at 14.[3] Nevertheless, the Circuit Court then went on to state that the City had failed to provide a nexus between nudity and non-adult entertainment (i.e., theater productions) and secondary effects and thus the ordinance was facially overbroad. Id. The concern of the Circuit Court rested upon the fact that the ordinance prohibited all nudity, including live performances with serious literary, artistic or political value. Id. at 15. The ordinance, like Erie Ordinance 75-1994, made no attempt to regulate those activities associated with

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on the narrowest grounds. Id. Since Barnes v. Glenn Theatre, supra, was a plurality decision, lower courts are obligated to focus their attention on the narrowest grounds offered in support of the decision.

[3] Because the court has found Erie Ordinance 75-1994 to be overbroad, the court will not address the secondary effects aspect of the enactment of the Ordinance. Following Barnes and Triplett II, evidence of secondary effects could be shown from outside sources rather than being directly related to the City of Erie.

undesirable secondary effects. Id. As drafted, these ordinances ban expressive conduct not generally associated with crime, sexual assault, and prostitution. Id.

This leads the court to the City's argument that the City would not enforce Ordinance 75-1994 against theater groups. This raises several concerns for the court. First, while it may be true the present administration has no intentions of enforcing the Ordinance against theatrical groups, there is no guarantee future administrations will do the same. This alone lends credence to Pap's A.M.'s argument that those in power cannot impose their moral beliefs on others. At any time, those in power may no longer be holding office, and with incoming legislatures, there would be new and different ideas of what is morally correct for the community. Second, the administration is not responsible for the enforcement of laws; the local police force bears this responsibility. Again, this leaves the enforcement of the Ordinance within the total discretion of the police force, which is not bound to follow the administration's policy on non-enforcement against the theatrical community.

In rendering this opinion, the court is mindful of the language of Supreme Court Justice David Souter who had this to say:

> Pasties and a G-string moderate the expression [of nude dancing] to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.

Barnes at 2471.

Conceptually, the court agrees with Justice Souter. However, since freedom of expression is a right guaranteed by the United States Constitution, the court must be very circumspect and apply stringent rules to be sure the Constitution is not violated. The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. amend. I.

Likewise, in adopting its own constitution, Pennsylvania has provided for the same freedoms. In this Commonwealth,

> . . . The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . .

Pa. Const. art. 1 §7.

The U. S. Constitution provides for the minimum level of protection afforded individual rights; however, a state constitution may provide greater protection. W. Pa. Soc. Wrkrs. v. Conn Gen. Life Ins., 512 Pa. 23, 515 A.2d 1331 (1986). It has been long recognized that Pennsylvania may afford greater protection to individual rights. Id. Article 1, Section 7, is part of Pennsylvania's Declaration of Rights and as such, is seen as a limitation of state powers. Id. This

provision has been interpreted to act as a guard against the imposition of prior restraints upon the communication of thoughts and opinions. Id. Thus, no matter how inspired a statute may be, if it restricts those freedoms which are constitutionally guaranteed, it cannot stand.

Although the court is not bound by the rationale offered in Triplett II, the court finds it to be far more persuasive then Barnes. The Erie Ordinance does not attempt to regulate only those activities associated with secondary harmful effects and does not contain any limiting provisions. Cf. Cafe 207, Inc. v. St. John's County, No. 92-390 (M.D. Florida 1994). All nudity is prohibited, despite the City's promises to the contrary. This leaves the statute applicable to other types of protected speech which contain nudity (i.e., theatrical performances). Simply stated, the Ordinance is overbroad. While the court has thoroughly examined the Barnes decision, it finds Barnes offers little guidance. Specifically, the Barnes decision does not address the issues presented here and confines the holding of the statute's constitutionality as it is applied.

The court now turns to defendants' argument that the court must sever the Ordinance in order to preserve legislation when the provision of an ordinance is found to be unconstitutional. The Ordinance itself speaks of construction and severability as follows:

> 6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the

> other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

City of Erie Ordinance 75-1994.

This provision is akin to 1 Pa. C.S.A. §1925, entitled Constitutional Construction of Statutes, whereby the legislature has provided where any provision or application of a statute is held invalid, the remainder shall not be affected. 1 Pa. C.S.A. §1925. This statutory construction provision applies to municipal ordinances as well. Greenwood Tp. v. Kefo, Inc., 52 Pa. Cmwlth. 367, 416 A.2d 583 (1980). Section 1925 further states that where the valid provisions of the statute are so essentially and inseparably connected with and dependent upon the void provision, it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one. 1 Pa. C.S.A. §1925. See also, Stoner v. Presbyterian University Hospital, 609 F.2d 109 (3rd Cir. 1979). While it is true that legislation enjoys the presumption of constitutionality, see Latella v. Com. Unemployment Compensation Board, 74 Pa. Cmwlth. 14, 459 A.2d 464 (1983), it is not without limitation. Legislation is not to infringe upon constitutionally guaranteed rights. The City would have the court strike the provision of the Ordinance which prohibits a person from appearing in a state of nudity or have the court determine the Ordinance does not prohibit those performances with serious literary, artistic,

nudity to be interwoven with the entire Ordinance so as not to be severable. To remove this provision would certainly place the Ordinance within the Pennsylvania Obscenity Statute at 18 Pa. C.S.A. §5903. Furthermore, without the provision prohibiting nudity, the Ordinance would not accomplish what the legislature intended, that being to restrict businesses which provide adult entertainment. In other words, without the anti-nudity provision, the Ordinance would serve no purpose. Finally, unlike City Council, this court cannot make the determination as to what entertainment provides serious literary, artistic or political expression. As so well stated in Salem Inn, Inc. v. Frank, 364 F.Supp. 478 (E.D.N.Y. 1973), affirmed 501 F.2d 18 (2nd Cir., 1974) affirmed in part and reversed in part, Doran v. Salem Inn, Inc., supra.

> . . . while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by the judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some "entertainment" with his beer or shot of rye.

Id.

The court has previously expressed its reservations regarding rewriting of the Ordinance. Legislation is not this court's duty, rather adjudication is. Furthermore, where legislation is clear and unambiguous in its terms, courts have no authority to add additional language in an attempt to clarify/amend the meaning of the ordinance/statute. Com., Dept. of Trans., Bureau of Driver Licensing v. Porter, __ Pa. Cmwlth. ____, 630 A.2d 945 (1993). As such, the court declines the City's invitation to amend the Ordinance.

As the court has found Ordinance 75-1994 to be unconstitutional, the court will not address Pap's A.M.'s preemption or equal protection arguments, as they are now moot.

Finally, the plaintiff has also asked for attorney fees. Even though the court has made a decision in favor of Pap's A.M., it believes the City enacted this Ordinance in good faith as it was relying on case law and in fact, Triplett II had not yet been decided by the Circuit Court when the ordinance was enacted. As such, the court finds that the awarding of attorney fees would be inappropriate.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties to this action and the subject matter thereto.

2. Plaintiff has standing in which to bring this action.

3. The City of Erie Ordinance 75-1994, as drafted, violates Article 1, Section 7, of the Pennsylvania Constitution and the First Amendment of the United States Constitution in that the Ordinance is overbroad as it prohibits all nudity, whether or not said nudity is related to adult entertainment.

4. A permanent injunction is hereby GRANTED in favor of plaintiff against defendants and defendants shall be barred from enforcing Ordinance 75-1994. The effective date of this permanent injunction is January 18, 1995.

5. City of Erie Ordinance 75-1994 is hereby declared unconstitutional and so shall be stricken.

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

FINAL ORDER[4]

AND NOW, to-wit, this 18th day of January, 1995, plaintiff's complaint and request for a permanent injunction is hereby GRANTED. Defendants, by and through their agents, are barred from enforcing Ordinance 75-1994 and said Ordinance is declared unconstitutional. Plaintiff's request for attorney fees is DENIED.

s/ George Levin
George Levin, Judge

[4] The parties to the action have entered into a stipulation allowing for the immediate entry of a final order rather than a decree nisi. This final order comes after a full hearing on the request for a permanent injunction and is done in anticipation of an immediate appeal.

Exhibit "A"

CITY COUNCIL OF ERIE

INTRODUCED BY: MR. THOMPSON

COUNCIL FILE NO. 14,482
OFFICIAL ORDINANCE NO. 75-1994

AN ORDINANCE

Amending Article 7 of the Codified Ordinances of the City of Erie (General Offenses) by repealing the present Article 711 - Indecency and Immorality, and substituting a new Article 711 to be titled Public Indecency, prohibiting certain conduct in public places, providing definitions relating thereto, and providing penalties for the violators thereof, including fines, imprisonment, and declaration of public nuisance, as appropriate.

WHEREAS the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity; and

WHEREAS, Council, by various enactments of General Offenses of Article 711 and 112, as well as amendments to the Zoning Ordinance, has expressed its intention to limit or restrict such lewd immoral activities, to

provide penalties for violations thereto and, in appropriate cases to declare the locations of such activities to be a public nuisance subject to abatement; and

WHEREAS, Council is fully aware of and fully respects the fundamental constitutional guarantees of free speech and free expression and realizes that restrictions of such freedoms must be carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare; and

WHEREAS, over the years, various statutes and court interpretations have been enacted and decided, which compel periodic re-evaluation and revision of City ordinances and regulations; and

WHEREAS, the current Article 711, Indecency and Immorality, the provisions of which date back as far as the year 1866, is outdated in part and unnecessary in part, and should be entirely replaced with new language consistent with current state and federal law; and

WHEREAS, Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in Barnes vs. Glen Theatre Inc., et al 111 Sup. Ct. 2456 (1991), for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

NOW THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY OF ERIE, PENNSYLVANIA AS FOLLOWS:

Section 1. Article 711 of the Codified Ordinances of the City of Erie (Indecency and Immorality) is hereby repealed and replaced in its entirety by a new Article 711, entitled Public Indecency, to read as follows:

1. A person who knowingly or intentionally, in a public place:

a. engages in sexual intercourse

b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

c. appears in a state of nudity, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquets [sic] halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection l(c) shall not apply to:

a. Any child under ten (10) years of age; or

b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

5. In addition to the specific penalties provided in this ordinance, it is hereby declared that any building, portion of a building, or enclosed place regularly used for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Commonwealth of Pennsylvania for the abatement of public nuisances, including, but not limited to the procedures set forth in Article 712 of the Codified Ordinances.

6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due

process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

7. PENALTY - Whoever violates this ordinance, either by commission of a public indecency, or by the promotion or maintenance of public indecency as property owner, proprietor or manager of a business, shall be guilty of a summary offense, and, upon conviction, shall be sentenced to pay a fine of not more than $1,000, or be imprisoned for not more than 90 days, or both. Each day such violation continues is a separate offense.

Section 2. That all ordinances and parts thereof conflicting herewith be and the same are hereby repealed.

Section 3. That this Ordinance shall become effective twenty days after final passage and approval by the Mayor.

We do hereby certify that the above ordinance was finally passed by the City Council on September 28, 1994.

SIGNED September 28, 1994

Attest: September 28, 1994

Chris E. Maras
President of Council

James Klemm
City Clerk

THIS ORDINANCE APPROVED THIS 30th DAY OF September, 1994.

Joyce A. Savocchio
Mayor

APPENDIX D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAP'S A.M. t/d/b/a KANDYLAND, Appellant	:	
v.	:	No. 445 C.D. 1995
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities	:	
PAP'S A.M. t/d/b/a KANDYLAND	:	
v.	:	No. 446 C.D. 1995
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Appellants	:	Argued: November 14, 1995

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION BY JUDGE DOYLE FILED: March 27, 1996

This case involves cross appeals by Pap's A.M. d/b/a/ Kandyland (Paps) and the City of Erie, Joyce A. Savocchio, Chris E. Maras, Mario S. Bagnoni, Robert C. Brabender, Denise Robison, and James N. Thompson, in their official capacity as members of City Council for Erie (collectively, the City), from an order of the Court of Common Pleas of Erie County which granted Paps' permanent injunction and declared the City's public indecency Ordinance 75-1994 unconstitutional.

On September 28, 1994, City Council for the City of Erie enacted a public indecency Ordinance 75-1994 (Ordinance), effective October 12, 1994.[1] The portion of the

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[1] The Ordinance states in relevant part:
Section 1. . . .

1. A person who knowingly or intentionally, in a public place:

   a. engages in sexual intercourse

   b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

   c. appears in a state of nudity, or

   d. fondles the genitals of himself, herself or another person commits Public

Ordinance which is challenged is Section 1, subsection (c) which makes it a summary offense for anyone to appear in public in a state of nudity. Thus, this section of the Ordinance requires female erotic dancers to wear "pasties"

Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection l(c) shall not apply to:

   a. Any child under ten (10) years of age; or

   b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

(Section 1 of Ordinance 75-1994.)

and "G-strings."

Paps is the operator of "Kandyland," an establishment which features nude erotic dancing.[2] On October 14, 1994, Paps filed a complaint in equity requesting a declaratory judgment declaring the ordinance unconstitutional, and Paps further requested injunctive relief and attorney fees.[3] On October 17, 1994, Paps filed a petition for a preliminary injunction to prevent the enforcement of the Ordinance, which the court denied. On January 18, 1995, after the final hearing was held relative to Paps' permanent injunction request, the court granted the permanent injunctive relief, declaring the Ordinance unconstitutional as facially overbroad, but denied Paps' request for attorney fees.

The City appealed alleging that (1) Paps does not have standing to challenge the Ordinance; (2) the Ordinance is not violative of Paps' right to free speech under the First Amendment of the Federal Constitution or Article 1, Section 7 of the Pennsylvania Constitution; (3) the Ordinance may be interpreted in a restrictive manner so as to avoid being deemed facially overbroad; (4) Pennsylvania's obscenity statute does not preempt the Ordinance; and (5) the named elected officials are not proper parties in the litigation. Paps' appeal asserts that the court erred in failing to award it attorney fees.

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[2] Alcoholic beverages are not served at Kandyland, but patrons are permitted to bring their own. Such an establishment is commonly referred to as a "bottle club."

[3] Although not parties in the case, the Erie Playhouse and the Roadhouse Theater were permitted to address the court in the final hearing held on December 21, 1994 with consent of the parties.

STANDING

The City avers that Paps has no standing to challenge the validity of the Ordinance, since its constitutional rights are not at issue, because the Ordinance only applies to the non-speech element of the nude dancing.

It is well established that a First Amendment constitutional challenge based upon the doctrine of overbreadth is an exception to traditional rules of standing. Osborne v. Ohio, 495 U.S. 103 (1990); Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994). Parties whose activities could properly be proscribed by an ordinance or statute may attack it on its face as being overly broad. Broadrick v. Oklahoma, 413 U.S. 601 (1973); City of Philadelphia v. Cohen, 479 A.2d 32 (Pa. Cmwlth. 1984). The impetus for granting standing liberally in First Amendment cases is to ensure that the free exchange of ideas will not be inhibited. Broadrick.

Here, Paps has challenged the Ordinance as not only being unconstitutional by infringing upon its own First Amendment rights, but also as being impermissibly broad, impinging upon the rights of other parties whose constitutionally protected speech may be affected, i.e., theaters. Thus, Paps has standing.

FIRST AMENDMENT - FREEDOM OF SPEECH

In Pennsylvania, a statute enjoy [sic] a strong presumption of constitutionality, and will not be found to be invalid unless it clearly, palpably and plainly violates the constitution. Patton v. Republic Steel Corp., 342 Pa. Superior Ct. 101, 492 A. 2d 411 (1985). The party challenging the statute has the burden to prove that it is invalid. Id.

The issues this Court must address are whether the Ordinance violates Paps' right to freedom of expression as guaranteed by the First Amendment to the United States Constitution[4] or Article 1, Section 7 of the Pennsylvania Constitution.

First Amendment of the United States Constitution

The City argues that under the holding of the United States Supreme Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), this Ordinance does not violate the First Amendment because it is only restricting conduct, not expression, and any slight infringement on First Amendment rights is permissible to protect the public from the secondary effects associated with the nude dancing. The City, as additional support for its proposition, cites United States v. O'Brien, 391 U.S. 367 (1968).

In O'Brien, the Supreme Court stated that to determine if a statute violates the First Amendment, the court must examine (1) whether the statute or regulation is within the constitutional power of the government to regulate; (2) if it furthers an important or substantial government interest; (3) if the government interest is related or unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential for the furtherance of that interest. Id. at 376-77.

Paps, on the other hand, argues that the four-part test

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[4] The federal constitutional guarantee of freedom of expression is applicable to states through the Fourteenth Amendment's due process clause. Long v. 130 Market Street Gift & Novelty of Johnstown, 294 Pa. Superior Ct. 383, 440 A.2d 517 (1982).

enunciated in O'Brien, which the Supreme Court relied upon in Barnes, was not satisfied in this case because this Ordinance was merely enacted to promote morality upon the public, and not to combat secondary effects.

Barnes, a plurality decision,[5] involved the constitutionality of an Indiana statute, which is virtually identical to the one in our case.[6] The challengers to the statute were owners and operators of bars that featured nude dancing as entertainment, and they challenged the statute as being violative of the First Amendment of the United States

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[5] Chief Justice Rehnquist wrote for Justice O'Connor and Justice Kennedy. Justice Souter and Justice Scalia concurred separately. Justice White wrote the dissent, to which Justice Marshall, Justice Blackmun and Justice Stevens joined.

[6] The Indiana statute states in pertinent part:

> A person who knowingly or intentionally in a public place:
>
> (1) engages in sexual intercourse;
> (2) engages in deviate sexual conduct;
> (3) appears in a state of nudity; or
> (4) fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

Ind. Code §35-45-4-1.

Constitution.[7]

The opinion of the Chief Justice stated that while nude dancing is expressive conduct within the peripheral boundaries of First Amendment protection, it is only marginally protected.[8] Chief Justice Rehnquist also wrote that applying the four-part test in O'Brien to the facts before it, the Indiana indecency statute was constitutional because it furthered a substantial government interest of protecting morality and societal order. The Ordinance reflected the public's disapproval of nudity in public. Moreover, the opinion stated that the restrictions of the statute were unrelated to the suppression of freedom of expression since it was **public nudity** the states wish to prevent, whether or not it is combined with expression, not the message. Barnes, 501 U.S. at 570-71.

The Chief Justice also found that public nudity is not per se expression. The requirement that the dancers wear "pasties" and "G-strings" does not regulate the communicative aspects of the dancing, but the conduct and the message of eroticism is still portrayed although in a less graphic manner. Id. Thus, the state's substantial interest in protecting the public health, safety and morals is enough to justify the slight infringement of First Amendment freedom of expression rights.

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[7] The Indiana statute was also challenged as being unconstitutionally overbroad.

[8] Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware 10 F.3d 123, 130 (3d Cir. 1993) (total suppression of erotic materials which have some artistic value will not be tolerated. "[I]f the regulation of sexually explicit materials is aimed primarily at suppression of First Amendment rights, then it is thought to be content-based and so presumptively violates the First Amendment").

Justice Souter, concurring, agreed that nude dancing is afforded some minimal First Amendment rights, but disagreed on how the O'Brien test applied. He based his concurrence "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments." Barnes, 501 U.S. at 582 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)). Justice Scalia also concurred in the result, but stated that nude dancing has no First Amendment protection, and the state need only demonstrate that a rational basis exists for the statute, i.e., it was enacted for the health, welfare, and safety of the public.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments in the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153 (1976)). Applying the Marks rule, Justice Souter's opinion articulates the holding of the Court since it shares with the majority of the Justices a common underlying approach and, since Justice Souter ruled on the narrowest ground, his concurrence therefore is the law. Triplett Grille, Inc. Thus, following Justice Souter's reasoning, an ordinance regulating speech can survive scrutiny if it satisfies the test in O'Brien, and is designed to prevent secondary effects associated with adult entertainment. Barnes; O'Brien; Triplett Grille, Inc.

Paps argues that the Ordinance does not meet the

requirements of O'Brien and Barnes,[9] because the Ordinance was enacted to promote the morality of the City of Erie, which under the analysis enunciated by Justice Souter is not a substantial government interest. Paps points to some statements made by members of City Council during the discussion of this Ordinance as support for its contention that the Ordinance was only enacted to preserve the morals of the community.

However, the purpose underlying the enactment of the Ordinance is revealed in the Ordinance itself. The Ordinance states in relevant part:

> WHEREAS, Council specifically wishes to adopt the concept of public indecency prohibited by the laws of the State of Indiana, which was approved by the Supreme Court in Barnes vs. Glen Theatre Inc., for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

(City of Erie Ordinance 75-1994.) (Citation omitted) (Emphasis added.)

Although some members of City Council voiced their personal reasons of morality as the impetus for their support

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[9] It is interesting to note that in Barnes, Justice Souter assumed that the legislators took the secondary effects into consideration.

of the Ordinance, (Reproduced Record (R.R.) at 32a-44a),[10] the Ordinance clearly and unambiguously states that it was enacted to prevent the commission of various sex-related crimes associated with nude dancing; that is, secondary effects. Statements made by lawmakers during the enactment procedure are not dispositive of the legislative intent, Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983); see also 1 Pa. C.S. §1921(c)(7). Furthermore, the legislative history cannot act as a rationale for contradicting the plain meaning of the words contained in a statute itself. Borough of West Chester v. Taxpayers of the Borough of West Chester, 566 A.2d 373 (Pa. Cmwlth. 1989).

Governmental attempts at controlling secondary effects associated with adult entertainment serve the government's substantial interest in promoting the health, safety and welfare of the people. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). Thus, the first prong of O'Brien, which requires that the restriction be within the constitutional power of the state, is met.

The second prong of the O'Brien test, that the restriction furthers a substantial government interest, is also satisfied. The Supreme Court in City of Renton stated that the government was not required to provide specific data which demonstrates that harmful secondary effects correlate to the presence of establishments which provide adult entertainment. City of Renton; Mitchell, 10 F.3d at 133

[10] Mr. Thompson, Mr. Brabender, Mr. Bagnoni, and Mr. Maras said that they support the Ordinance because of their desire to instill good values on the public. Mrs. Robinson, who was absent from the meeting, stated in a letter that she supported the ordinance to protect the morals of the community. (Transcript of the videotape of City Council's 9/28/94 meeting; R.R. at 32a-44a.)

("[t]he First Amendment does not require a city before enacting such an ordinance to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"). The city only needs to show that adult entertainment establishments is a class of conduct which causes the unwanted secondary effects the statute regulates. City of Renton; Mitchell.

Here, the type of activity at issue is the same exact variety as the restricted entertainment in Barnes; therefore, it is proper for this Court to find that the same harmful secondary effects which were found to be caused by the nude erotic dancing in Barnes, will also occur in this case, and that this Ordinance furthers the City's substantial interest in safeguarding the public from these harmful secondary effects. Thus, the second prong of O'Brien is met.

The third requirement of O'Brien is that the government's interest must be unrelated to the suppression of free expression. In Barnes, Justice Souter, along with a majority of the Court, found that a statute which bans public nudity is not related to the suppression of the erotic message, that is, the expressive component of the dance. Justice Souter states that the restriction directly relates to the prevention of the secondary effects.[11] Barnes; Compare Berg v. Health & Hospital Corporation of Marion County, 865 F.2d 797 (7th Cir. 1989) (restrictions on the types of doors or openings to individual entertainment booths merely regulate the

[11] Chief Justice Rehnquist states that the ban on public nudity is unrelated to freedom of expression because the evil the government pursues is public nudity, whether or not it is combined with expressive conduct. Barnes, 501 U.S. at 570-71.

non-communicative aspects of the erotic activity and thereby impose only an incidental burden on plaintiff's first amendment rights); Mini Spa, Inc. v. South Salt Lake City Corp., 810 F.2d 939 (10th Cir. 1987) (city's interest in regulating prostitution through an ordinance prescribing a dress code for massage parlors was unrelated to inhibiting freedom of expression).

Here, like in the statute in Barnes, the requirement that the dancers wear "pasties" and "G-strings" is not related to the suppression of the erotic expression, but is related to the avowed purpose of safeguarding the public from the harmful secondary effects associated with adult entertainment.

The last prong of O'Brien is that the restriction be no greater than is essential for the furtherance of the government interest. Such restriction is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689 (1985). Again, as was found in Barnes, we hold that requiring dancers to don "pasties" and "G-strings" infringes on the dancers' expression only inconsequentially. The erotic message is still able to be conveyed; it is just less graphic, and therefore, the prohibition of public nudity is narrowly tailored. Barnes. Following the sound reasoning of Justice Souter in Barnes, we similarly conclude that the City's Ordinance is narrowly tailored.

Accordingly, the Ordinance satisfies the requirements of O'Brien and does not violate Paps' First Amendment rights, despite the incidental limitations on some expressive activity.[12]

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[12] See Turner v. State, 650 N.R. 2d. (Ind. Ct. App. 1995), petition for cert. filed, (Jan. 18, 1996) ; State ex rel. Miller v. Private Dancer, 613 N.E. 2d 1066 (Ohio Ct. App. 1992).

Article 1, Section 7 of the Pennsylvania Constitution

It is clear that the federal Constitution affords the minimum protection of individual rights, and a state may, if it so chooses, interpret a state constitution to afford greater protection of fundamental rights. Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991).

Article 1, Section 7 of the Pennsylvania Constitution provides protection for the "free communication of thoughts . . . and every citizen may freely speak, write and print on any subject . . . being responsible for the abuse of that liberty." Article 1, Section 7 of the Pennsylvania Constitution. The Pennsylvania Constitution provides essentially the same protection of expression as does the United States Constitution, and to that extent, what we have concluded above regarding the federal Constitution would also apply to our own Pennsylvania Constitution. See Long v. 130 Market Street Gift & Novelty of Johnstown, 294 Pa. Superior Ct. 383, 440 a.2d [sic] 512 (1982). Neither constitution provides for unfettered freedom of expression. The Pennsylvania Constitution, however, does differ in that it has codified the proscription of the imposition of prior restraints on speech, whereas pursuant to the federal Constitution, prior restraints are prohibited in most situations based upon the common law. See Freedom v. Maryland, 380 U.S. 51 (1965); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance, Co., 512 Pa. 23, 515 A.2d 1331 (1986).

A prior restraint in general terms is a prohibition on speech in advance of its publication or expression. United States v. Schiavo, 504 F.2d 1 (3d. Cir.) cert. denied, 419 U.S. 1096 (1974). The restraint must unduly burden the expression to be violative. Id. The instant case does not

involve a prior restraint because: (1) the Ordinance is not regulating the expressive element of the dance, but rather, the conduct or manner of the dance; and (2) the requirement that the dancers wear "pasties" and "G-strings" is not unduly burdensome.

Accordingly we hold that in this case that the Ordinance does not violate Section 7 of Article 1 of the Pennsylvania Constitution.

OVERBREADTH

A statute which implicates First Amendment freedoms of expression may be declared unconstitutional where the regulations are overbroad by significantly compromising clearly recognized First Amendment rights. Broadrick, 413 U.S. 601 (1973). The overbreadth doctrine is "strong medicine" which is used only sparingly and only as a last resort. Id. R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992). "[A] regulation's invalidation threshold for overbreadth increases when the activity regulated moves from speech to conduct having an incidental impact on First Amendment rights." City of Philadelphia v. Cohen, 479 A.2d 32, 35 (Pa. Cmwlth. 1984); see also Mitchell. "[A] statute is not overbroad merely because its application implicates protected activity." Marie Guy v. Woods, 522 A.2d 193, 195 (Pa. Cmwlth. 1987).

Paps successfully argued below that the Ordinance was unconstitutional on its face because it is overbroad, since it proscribes all public nudity, even live performances with serious literary, artistic or political value.[13] Paps relies

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[13] Bill Morton, a representative of the Erie Playhouse and the Roadhouse Theater, informed the lower court during the final hearing that

heavily on Triplett Grille, Inc. as support for its argument. The City, on the other hand, appears to argue that the ordinance is not overly broad, because it is subject to a limiting interpretation, based upon the holding in Barnes.

Triplett Grille, Inc. involved an Akron, Ohio, indecency ordinance, which, like the ordinance at issue here and in Barnes, banned public nudity. An adult establishment which featured nude dancing challenged the ordinance, inter alia, on its face as being overbroad.

The Federal Court of Appeals for the Sixth Circuit held that although the ordinance had been enacted in part due to the city council's concern for the secondary effects, it was unconstitutional because the ordinance prohibited all public nudity including that related to literary, artistic and political value, and made no attempt to regulate only those expressive activities associated with the secondary effects, and, therefore, swept too broadly. Triplett Grille, Inc. "Because [Akron] failed to present evidence linking expressive nudity in 'high-culture' entertainment [theatrical performances such as, "Hair" or "Equus"] to harmful secondary effects, we conclude that the ordinance infringes speech protected by the First Amendment." Triplett Grille, Inc., 40 F.3d at 136.

The court continued and stated: "While loath to find that the Akron public indecency ordinance violated the First Amendment, this Court is unable to supply a limiting construction for the regulation. It is well recognized that federal 'courts do not rewrite statutes to create

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he fears that the Ordinance will adversely affect the arts community by inhibiting certain types of artistic performances at the playhouse which involve some nudity. (Transcript of 12/21/94 final hearing at 18-19; R.R. at 173a-74a.)

constitutionality.'" Id. However, a state court handling a state statute challenged as overbroad, should construe the statute to avoid constitutional problems, when the statute is subject to a limiting construction, New York v. Ferber, 458 U.S. 747 (1982), as was done by the Indiana State Supreme Court in Barnes.

In Barnes, the United States Supreme Court did not have to address the overbreadth doctrine because the Indiana Supreme Court adequately narrowed the indecency statute to save it from a facial overbreadth attack. The state court held that it is within the state's power to prohibit public nudity, and that the statute was designed to regulate conduct, not speech. The court also recognized that some public nudity would be tolerated where a communication of ideas is involved. Therefore, the court adequately tailored the statute to apply only to non-expressive activities. We do the same here.

Although it is arguable that the Ordinance could affect protected expression, Paps' claim that the Ordinance is overbroad is neither "substantial" nor "real."[14] The number of artistic performances which involve nudity is slight, and, therefore, the infringement on protected areas of speech is insubstantial. And, if, there is any attempt to enforce the Ordinance against such artistic and theatrical performances,

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[14] Accord SBC Enterprises, Inc. v. City of South Burlington, 892 F. Supp. 578, 584 (D. Vt. 1995) (ordinance which prohibits public nudity is not overbroad because the sweep is not "substantial." Only a few serious artistic works involve nudity, and the ordinance "does not encompass a sufficient amount of protected behavior . . . "). But cf. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (an ordinance which bans all live entertainment - adult or otherwise - is unconstitutionally overbroad).

the parties whose rights are infringed upon could bring a First Amendment challenge. Furthermore, it is undisputed that a performance of "Equus" occurred at the Roadhouse Theatre during the months of October and November of 1994, after the City enacted the Ordinance. Thus, the overbreadth is not "real."

Furthermore, the ordinance is written to limit its enforcement. The Ordinance states in part that:

> 6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free of [sic] speech, free expression, due process, equal protection or other fundamental rights . . . .

(City of Erie Ordinance 75-1994.) We interpret and limit the Ordinance to ban the act of being nude in public, not expression. Barnes (requiring a dancer to wear "pasties" and a "G-string" does not directly impinge upon First Amendment rights, where a substantial government interest is involved).

Accordingly, applying the overbreadth doctrine, we hold that the Ordinance is not unconstitutional on its face.

PREEMPTION - PENNSYLVANIA'S OBSCENITY STATUTE

Paps appears to argue also that the Ordinance is preempted by the state's obscenity statute, Section 5903(a) of the Crimes Code, 18 Pa. C.S. §5903(a), because the Ordinance criminalizes nude dancing under the guise of

protecting the morals of the community, which is inconsistent with the obscenity statute of the Commonwealth which also was enacted to protect the morals of the community. The City counters that the local indecency Ordinance is consistent with the Commonwealth's obscenity statute, and therefore, is not preempted.

The obscenity statute provides in part:

> (a) OFFENSES DEFINED.-- No person, knowing the obscene character of the materials or performances involved, shall:
>
> . . . .
>
> (5) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity; or
>
> . . . .
>
> (b) DEFINITIONS. . . .
>
> "OBSCENE." Any material or performance, if:
>
> (1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;
>
> (2) the subject matter depicts or describes in a patently offensive way, sexual conduct . . .
>
> (3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

> . . . .
>
> (k) ORDINANCES OR RESOLUTIONS.-- Nothing in this chapter shall be construed to invalidate, supersede, repeal or preempt any ordinance or resolution of any political subdivision insofar as it is consistent with this chapter, and political subdivisions further retain the right to regulate any activities, displays, exhibitions or materials not specifically regulated by this chapter.

Section 5903 of the Crimes Code, 18 Pa. C.S. §5903.

In Council of Middletown Township v. Benham, 514 Pa. 176, 523 A.2d 311 (1987), the court stated that merely because a state has legislated in an area of law does not denote that the state law preempts the field. "The General Assembly must clearly show its intent to preempt a field in which it has legislated. The test for preemption . . . . is well established. Either the statute must state on its face that local legislation is forbidden, or 'indicate[] an intention on the part of the legislature that it should not be supplemented by municipal bodies.'" Id. at 180-81, 523 A.2d at 313 (citations omitted) (alterations in the original).

The obscenity statute at issue does not state that it preempts the field, and in fact, subsection (k) of the statute permits local governments to enact laws in the area of obscenity as long as they are consistent with the statute. The indecency Ordinance and obscenity statute may overlap in some areas, but they regulate different activities. The Ordinance was enacted to prohibit public nudity, not obscene

behavior,[15] and was designed to protect the public from the secondary effects associated with nude dancing, not lewd behavior. It was not enacted for the purpose of criminalizing obscene behavior; in fact, the Ordinance does not mention obscenity.[16]

Accordingly, we hold that the Ordinance is not preempted by the Pennsylvania obscenity statute.

ATTORNEY FEES AND NAMED PARTY - DEFENDANTS

Since we find that the Ordinance is constitutional and is not preempted by the obscenity statute, we need not address the two remaining issues (1) whether the denial of attorney fees was in error and (2) whether the individually named defendants (the named City Council members) are proper parties to this case.

Accordingly, we reverse the order of the Court of Common Pleas of Erie County.

s/ Joseph T. Doyle
JOSEPH T. DOYLE, JUDGE

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[15] Nude dancing alone is not considered an obscene activity. See Barnes.

[16] Compare 1916 Delaware Tavern v. Zoning Board of Adjustment, 657 A.2d 63 (Pa. Cmwlth. 1995). In this case, the Court held that a zoning ordinance which restricted the locations of cabarets featuring erotic dancing was not preempted by the Liquor Code, Act of April 12, 1951, P.L. 90, as amended, 47 P.S. §§ 1-101 to 9-902. The Court found that the Liquor Code and the zoning ordinance were not inconsistent, even though the Liquor Code prohibited nude erotic dancing and the zoning ordinance restricted locations of cabarets that featured exhibitions of specified anatomical areas.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAP'S A.M. t/d/b/a KANDYLAND, Appellant	:	
v.	:	No. 445 C.D. 1995
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities	:	
PAP'S A.M. t/d/b/a KANDYLAND	:	
v.	:	No. 446 C.D. 1995
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Appellants	:	

O R D E R

NOW, March 27, 1996, the order of the Court of Common Pleas of Erie County, is hereby reversed.

s/ Joseph T. Doyle
JOSEPH T. DOYLE, JUDGE

CERTIFIED FROM THE RECORD
AND ORDER TEXT

AR 27 1996

s/ C.R. Hostutler
Deputy Prothonotary-
Chief Clerk

APPENDIX E

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Pap's A.M. t\d\b\a\	:	230 & 231 Western
Kandyland	:	District Allocatur
Petitioner	:	Docket
	:	
v.	:	Petition for Allowance
	:	of Appeal from the
The City of Erie,	:	Commonwealth Court
Joyce A. Savocchio,	:	
Chris E. Maras,	:	
Mario S. Bagnoni,	:	
Robert C. Brabender,	:	
Denise Robinson [sic],	:	
and James N. Thompson,	:	
in their official capacities,	:	
Respondents	:	

ORDER

PER CURIAM:

AND NOW, this 28th day of January, 1997, the Petition for Allowance of Appeal is hereby **GRANTED, BUT LIMITED** to the following issues:

I. Whether the Erie City Ordinance is unconstitutionally overbroad.

III. Whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and

Article I, section 7 of the Pennsylvania Constitution.

Madame Justice Newman did not participate in the consideration or decision of this matter.

A True Copy Amy J. Ceraso, Esquire
as of: January 28, 1997

Attest: s/Amy Ceraso

Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX F

[J-142-1997]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAP'S A.M. t/d/b/a KANDYLAND,	:	Nos. 016 and 017 Western District Appeal Docket 1997
Appellant	:	
v.	:	Appeal from the Order of the Commonwealth Court of Pennsylvania,
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBINSON [sic], and JAMES N. THOMPSON, in their official capacities, Appellees	:	entered March 27, 1996 at Nos. 445 and 446 C.D. 1995, Reversing the Order of the Court of Common Pleas of Erie County, Pennsylvania, Civil Division, entered January 18, 1995 at No. 60059 of 1994
	:	674 A.2d 338 (Pa. Commw. Ct. 1996).
	:	ARGUED: September 16, 1997

OPINION OF THE COURT

MR. JUSTICE CAPPY DECIDED: OCTOBER 21, 1998

This is an appeal by allowance from the order of the Commonwealth Court reversing the trial court's order permanently enjoining the enforcement of the City of Erie's Ordinance 75-1994 ("Ordinance"), and striking the Ordinance in its entirety. For the following reasons, we now reverse.[1]

On September 28, 1994, the City Council for the City of Erie ("City Council") enacted the Ordinance.[2] The

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[1] We have jurisdiction over this matter pursuant to 42 Pa.C.S. § 724.

[2] The Ordinance states in relevant part:

> 1. A person who knowingly or intentionally, in a public place:
>
> a. engages in sexual intercourse;
>
> b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code;
>
> c. appears in a state of nudity, or
>
> d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.
>
> 2. "Nudity" means the showing of the human male or female genital (sic), pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
>
> 3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.
>
> 4. The prohibition set forth in subsection l(c) shall not apply to:
>
> a. Any child under ten (10) years of age; or
>
> b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.
>
> . . . .
>
> 6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

Ordinance states, inter alia, that it is a summary offense to appear in a "state of nudity". In order to avoid being in a "state of nudity," a female person over the age of ten years of age would have to wear, at a minimum, what are commonly known as "pasties" and a "G-string". The effective date for the Ordinance was October 12, 1994.

Pap's A.M. ("Appellant") is the operator of an

establishment known as "Kandyland" which features nude erotic dancing performed by women. On October 14, 1994, Appellant filed a complaint in equity, naming the City of Erie, the mayor for the City of Erie, and the members of the City Council ("Appellees") as defendants. In its complaint, Appellant requested a declaratory judgment declaring the Ordinance unconstitutional as well as injunctive relief and attorney's fees.

The Court of Common Pleas of Erie County held hearings on this matter. On January 18, 1995, the trial court determined that the Ordinance was unconstitutionally overbroad on its face. It therefore granted the permanent injunction and struck down the Ordinance. The trial court, however, denied Appellant's request for attorney fees.

Appellant and Appellees cross-appealed to the Commonwealth Court. The Commonwealth Court determined that the trial court erred when it held that the Ordinance was unconstitutionally overbroad. Furthermore, it determined that Appellant's additional claim that the Ordinance impermissibly infringed upon Appellant's right to freedom of expression as guaranteed by the United States and Pennsylvania Constitutions was not borne out. It therefore reversed the trial court's order striking the Ordinance and awarding Appellant injunctive relief.[3]

Appellant then filed a petition for allowance of appeal with this court. We granted review, limited to the issues of whether the Ordinance violates the right to freedom of expression as guaranteed by the United States and

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[3] Since the Commonwealth Court found that the Ordinance was constitutional, it saw no need to address Appellant's claim that it was entitled to attorney's fees.

Pennsylvania Constitutions and whether the Ordinance is unconstitutionally overbroad.[4]

In examining whether the ordinance violates Appellant's freedom of expression as guaranteed by the First Amendment[5], we must initially determine whether nude dancing constitutes expressive conduct which is within the First Amendment's protective ambit. The act of being in the nude is not, in and of itself, entitled to First Amendment protection because no message is being conveyed. Cf. Texas v. Johnson, 491 U.S. 397, 403-406, 109 S.Ct. 2533, 2539-2540, 105 L.Ed.2d 342, 352-354 (1989) (act of desecrating flag is not critical point in determining whether actor is engaging in expressive conduct; rather, the question to be answered is whether the actor intended to convey a particularized message). Yet the act of dancing nude, with its attendant erotic message, is an expressive act entitled to First Amendment protection. We can say this with certainty because a majority of the United States Supreme Court recently endorsed such a view in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Although Barnes was an otherwise hopelessly fragmented decision, eight of the nine members of the Court agreed that nude dancing, as it portrayed an erotic message, is expressive conduct and is entitled to some quantum of protection under the First Amendment. Id. at 565-566, 111 S.Ct. at 2460, 115

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[4] In reviewing the determination of the court below, our scope of review is plenary as the issues presented in this case are questions of law. See Phillips v. A-BEST Products Co., 542 Pa. 124, 130, 665 A.2d 1167, 1170 (1995).

[5] The First Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 855 n. 1, 102 S.Ct. 2799, 2802 n.1, 73 L.Ed.2d 435, ___ n. 1 (1982).

L.Ed.2d at 511 (Rehnquist, C.J., authoring the opinion announcing the judgment of Court, joined by O'Connor and Kennedy, JJ.); id. at 581, 111 S.Ct. at 2468, 115 L.Ed.2d at 521 (Souter, J., concurring); id. at 587, 111 S.Ct. at 2471, 115 L.Ed.2d at 525 (White, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.)

As we have determined that nude dancing is entitled to some First Amendment protection, we must next decide whether the Ordinance is related to the suppression of expression. Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105 L.Ed.2d at 352. In making this determination, we determine whether the governmental interest in enacting the Ordinance was a content-neutral one. See United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968). Resolution of this inquiry is critical to our analysis for if the Ordinance is related to the suppression of expression, then the onerous strict scrutiny test applies. Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105 L.Ed.2d at 352; see also United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736, 744 (1983) (content-based restrictions will be upheld only if they are narrowly drawn to accomplish a compelling governmental interest.) If, however, the governmental interest is content-neutral, and therefore is unrelated to the suppression of expression, "then the less stringent standard . . . announced in United States v. O'Brien for regulations of noncommunicative conduct controls."[6]

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[6] The O'Brien Court stated that the "government regulation is sufficiently justified" if it meets all factors of the following four-part test:

1) Promulgation of the regulation is within the constitutional power of the government;
2) The regulation furthers an important or substantial governmental interest;
3) The governmental interest is unrelated to the suppression of free expression; and

Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105 L.Ed.2d at 352.

In determining whether the Ordinance is related to the suppression of free expression, the Commonwealth Court below turned for guidance to the United States Supreme Court's decision in Barnes, supra, a case which presented a situation very similar to the one presented in the matter sub judice. After engaging in the difficult task of determining what, if any, holding could be gleaned from the hopelessly fragmented Barnes Court, the Commonwealth Court determined that the concurring opinion authored by Justice Souter was dispositive.

We, too, begin our analysis of whether the Ordinance is content-based by reviewing the Barnes decision. The Court in Barnes analyzed an Indiana statute, which is strikingly similar to the Ordinance we are examining, to determine whether that statute violated the First Amendment. Unfortunately for our purposes, the Barnes Court splintered and produced four separate, non-harmonious opinions. We must review each of the opinions to see if any holding can be gleaned from them.

The Chief Justice, in his opinion announcing the judgment of court, concluded that nude dancing is expressive conduct within the peripheral boundaries of First Amendment

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4) The incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968).

protection. He determined that the statute in question was a content-neutral restriction on speech since the governmental interest in protecting societal order and morality was unrelated to the suppression of free expression. Id. at 568, 111 S.Ct. at 2461, 115 L.Ed.2d at 512. He went on to conclude that the statute met the less stringent standard of O'Brien.

Justice Scalia authored a separate concurring opinion. Barnes, 501 U.S. at 572, 111 S.Ct at 2463, 115 L.Ed.2d at 515 (Scalia, J. concurring). Although he agreed with the Chief Justice's conclusion that the statute was constitutional, Justice Scalia arrived at this conclusion by a radically different route. Disagreeing with the other eight members of the Court, he would have found that nude dancing is entitled to no First Amendment protection, and that only a rational basis for the statute need exist for the statute to be found constitutional. Id. at 580, 111 S.Ct. at 2468, 115 L.Ed.2d at 520.

Justice Souter also agreed with the result reach [sic] by the Chief Justice, but wrote separately to express his view that the content-neutral governmental interest forwarded by the statute was prevention of the negative secondary effects (such as prostitution, sexual assault, and other criminal acts) which are associated with nude dancing establishments. Id. at 582, 111 S.Ct. at 2469, 115 L.Ed.2d at 522 (Souter, J., concurring).

Justice White's dissenting opinion, which was joined by Justices Marshall, Blackmun, and Stevens, garnered the most votes of any of the Barnes opinions. Id. at 587, 111 S.Ct. at 2471, 115 L.Ed.2d at 525 (White, J., dissenting). Justice White expressed the opinion that the purpose of the statute was "to protect the viewers from what the State

believes is the harmful message that nude dancing communicates." Id. at 591, 111 S.Ct. at 2473, 115 L.Ed.2d at 527. Thus, since the statute was content-based, it was subject to analysis under the strict scrutiny test, a test which the dissenters believed the statute could not pass because the statute was not narrowly tailored. Id. at 594, 111 S.Ct. at 2475, 115 L.Ed.2d at 529.

From this hodgepodge of opinions, the Commonwealth Court selected the concurring opinion authored by Justice Souter as expressing the position of the Court and accorded it the status of binding precedent. In arriving at this conclusion, the Commonwealth Court quoted the United States Supreme Court's dictate that where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260, 266 (1977). Applying Marks to the Barnes opinions, the Commonwealth Court concluded that Justice Souter's opinion provided those "narrowest grounds" and therefore accorded it precedential effect.

While we empathize with the Commonwealth Court's plight when faced with trying to make sense out of Barnes, we cannot agree that Justice Souter's concurring opinion is binding precedent. We agree that it is possible to cobble together a holding out of a fragmented decision.[7] Yet, in order to do so, a majority of the Court must be in agreement on the concept which is to be deemed the holding. It is

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[7] In fact, we have done so in this opinion at page 5, supra.

certainly permissible to find that a Justice's opinion which stands for the "narrowest grounds" is precedential, but only where those "narrowest grounds" are a sub-set of ideas expressed by a majority of other members of the Court. The mere finding that one Justice expressed a narrower belief than others does not dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent.

It is simply not possible to find that Justice Souter's position in Barnes commanded five votes. Even if we were to assume arguendo that his concurring opinion provided an approach which was "narrower" than, and yet still encompassed by and consistent with, the one taken by the Chief Justice, such a concession would provide only four votes for Justice Souter's position. The fifth vote for Justice Souter's position is not forthcoming. It cannot be provided by Justice Scalia, who believed that restrictions on nude dancing are not to be analyzed pursuant to the First Amendment. Nor can it be said that the dissenters, who rejected the notion that the state's goal of combating secondary effects via the statute rendered the statute content-neutral, were in agreement with Justice Souter.

We find that the Commonwealth Court's determination that Justice Souter's "secondary effects" rationale represents the "holding" of Barnes is simply not borne out. In fact, aside from the agreement by a majority of the Barnes Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the Barnes Court agreed. Thus, although we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of Barnes on the issue of whether the Ordinance in the matter sub judice passes muster under the First Amendment.

Having determined that there is no United States Supreme Court precedent which is squarely on point, we turn to our own independent examination of the Ordinance itself to determine whether it is related to the suppression of free expression. The City Council stated plainly in the Ordinance that it was adopting this regulation

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance. We find that Justice White expressed this position most eloquently in his dissenting opinion in Barnes when he declared that

> it cannot be [said] that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory

> prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication.

Barnes, 501 U.S. at 592, 111 S.Ct. at 2474, 115 L.Ed.2d at 528 (White, J. dissenting). We believe that Justice White's analysis is directly applicable to the situation before us now, and that the stated purpose for promulgating the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing.

We find further support for our rationale in the United States Supreme Court's holding in Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). In Forsyth County, a county ordinance imposed a fee for the issuance of parade permits. The administrator responsible for setting the fee was directed to take into account, among other things, the possible costs of police protection needed at certain events. Id. at 127, 112 S.Ct. at 2399, 120 L.Ed.2d at 109. "The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." Id. at 134, 112 S.Ct at 2403, 120 L.Ed.2d at 113-114.

As in the matter sub judice, the governmental entity

in Forsyth declared that the ordinance permitting the adjustable fee was content-neutral because it was "aimed only at a secondary effect - - the cost of maintaining public order." Id. at 134, 112 S.Ct. at 2403, 120 L.Ed.2d at 114. The Court flatly rejected this argument, stating that the secondary effects rationale was inextricably linked with the suppression of speech for the negative secondary effects were related to the content of the expressive message conveyed by the marchers. The Court cogently stated that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." Id.

Similarly, the negative secondary effects associated with nude dancing are inextricably linked to the erotic message of the dance. Thus, as in Forsyth County, we find that a content-neutral reason is insufficient to save the ordinance since it is inextricably linked with a content-based motivation for the restriction.

Since the Ordinance's restrictions are content-based, we must now determine if the Ordinance passes the strict scrutiny test. Grace, 461 U.S. at 177, 103 S.Ct. at 1707, 75 L.Ed.2d at 744. In order to pass the strict scrutiny test, the burden is on Appellees to establish that the ordinance is narrowly drawn to accomplish a compelling governmental interest. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118, 112 S.Ct. 501, 509-510, 116 L.Ed.2d 476, 488 (1991).

We begin our review of this issue by noting that Appellees have not presented us with a strict scrutiny analysis as part of their brief. Establishing that the Ordinance passes the strict scrutiny test is a burden for Appellees to bear. Simon & Schuster, supra. Appellees' utter failure to carry their burden on this point would be a sufficient reason to find that the strict scrutiny test was not met here.

Furthermore, our own independent analysis of this issue leads us to conclude that the strict scrutiny test cannot be satisfied. The most compelling governmental interest which could be articulated in connection with the Ordinance is the interest in deterring sex crimes. It is beyond cavil that curbing crimes such as prostitution and rape is a compelling governmental interest.

Yet, that determination satisfies only one half of the strict scrutiny test. It still must be established that the Ordinance is narrowly tailored to meet this compelling interest. On this front, we come to the inescapable conclusion that the Ordinance must fail. We agree with Justice White's statement in Barnes that there are several ways to combat these social ills without banning the expressive activity of nude dancing. Justice White suggested that "the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city." Barnes, 501 U.S. at 594, 111 S.Ct. at 2475, 115 L.Ed.2d at 529. These restrictions, unlike the restrictions found in the Ordinance, could be viewed as content-neutral restrictions on the time, place, and manner in which nude dancing could be conducted, and, if so, would not trigger the strict scrutiny test.

Furthermore, we also find it highly circuitous to prevent rape, prostitution, and other sex crimes by requiring a dancer in a legal establishment to wear pasties and a G-string before appearing on stage. We believe that imposing criminal and civil sanctions on those who commit sex crimes such as prostitution or rape would be a far narrower way of achieving the compelling governmental

interest.

Now that we have determined that the Ordinance places an unconstitutional burden on Appellant's freedom of expression, we next consider Appellees' claim that we may sever the unconstitutional portions rather than striking the Ordinance in its entirety. In support of their position, Appellees' [sic] rely upon 1 Pa.C.S. § 1925[8] and the "Construction and Severability" clause of the Ordinance.[9]

When we determine that an ordinance is unconstitutional, we sever the unconstitutional portions if "the remainder of the [Ordinance] . . . shall not be affected thereby . . . ." 1 Pa.C.S. § 1925. Yet, we are specifically directed that we may not sever the unconstitutional portions of an ordinance where "the valid provisions of the [Ordinance] are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the [City Council] would have enacted the remaining valid provisions without the void one . . . ." Id.

Appellees assert that this court may "sever" the Ordinance by merely "sever[ing] only the necessary 'expressive' nudity from the ordinance . . . ." Appellees' Brief at 13. As there is no language in the Ordinance which

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[8] Section 1925 is part of the Statutory Construction Act ("Act"). In construing an ordinance, we follow the dictates of the Act even though the Act applies specifically to statutes and is not expressly applicable to local ordinances. Patricca v. Zoning Bd. of Adjustment of the City of Pittsburgh, 527 Pa. 267, 590 A.2d 744 (1991).

[9] See footnote 1, supra, for the full text of the "Construction and Severability" clause of the Ordinance.

separates non-expressive nudity from expressive nudity, we presume that Appellees would have this court draft such language and insert it into the Ordinance.

Such a position shows a fundamental misunderstanding of the mechanics of severing void portions of a statute as well as the constitutional doctrine of separation of powers. In severing void portions of a statute or ordinance, a court is empowered merely to strike existing language; the judiciary is given no authority to draft its own language and insert it into the statute or ordinance.

Limitations on the power to sever statutes and ordinances are consistent with the constitutional doctrine of the separation of powers, a doctrine which has been at the heart of our governmental system since the 1776 Plan or Form of Government for the Commonwealth or State of Pennsylvania. Dauphin County Grand Jury Investigation Proceedings (No. 2), 332 Pa. 342, 352-353, 2 A.2d 804, 807 (1938). By this doctrine, the legislative branch, and not the judicial branch, is given the power to promulgate legislation. The Federalist No. 47 (James Madison). To aggregate to ourselves the power to write legislation would upset the delicate balance in our tripartite system of government. We therefore decline Appellees' invitation.[10]

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[10] Appellees' citation to Commonwealth, Dept. of Education v. First School, 471 Pa. 471, 370 A.2d 702 (1977) for the proposition that we may rewrite the Ordinance is unavailing. In First School, this court merely excised all portions of a statute which referred to giving financial aid to sectarian schools, leaving all those provisions which gave financial aid to non-sectarian schools. No portion of First School endorsed this court violating the separation of powers by engaging in the legislative function of drafting legislation.

Yet another option for severing the Ordinance would be to remove §§ 1(c) and 2, the provisions which concern the bar to public nudity. We find this option to be tenable. In severing those portions of the Ordinance, we would remove but one of the four prohibitions. The other three forbidden activities[11] are independent of the public nudity ban, and striking §§ 1(c) and 2 would in no fashion render those other provisions inoperative. The other three prohibitions are thus not so "essentially and inseparably connected with" the public nudity ban that we could conclude that the City Council would have opted not to enact the valid provisions without §§ 1(c) and 2. We thus find that severance is appropriate pursuant to 1 Pa.C.S. § 1925, and sever §§ 1(c) and 2 from the Ordinance.

The order of the Commonwealth Court below is reversed.[12]

Madame Justice Newman did not participate in the consideration or decision of this matter.

Mr. Justice Castille files a concurring opinion in which Mr. Justice Zappala joins.

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[11] Those three activities are: publicly engaging in sexual intercourse; publicly engaging in deviate sexual intercourse; and, publicly fondling genitalia. Footnote 2, supra.

[12] As we have determined that the Ordinance violates Appellant's freedom of expression as guaranteed by the United States Constitution, there is no need for us to determine whether the comparable provision found in Article I, § 7 of the Pennsylvania Constitution is also violated. Furthermore, we need not address either Appellant's claim that the Ordinance is unconstitutionally overbroad, or Appellees' claim that Appellant lacks standing to raise this overbreadth challenge.

Judgment Entered October 21, 1998,

s/ Patricia Honard
CHIEF CLERK

[J-142-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAP'S A.M. T/D/B/A KANDYLAND, Appellant	:	Nos. 016 and 017 Western District Appeal Docket 1997
v.	:	Appeal from the Order of the Commonwealth Court of Pennsylvania,
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBINSON [sic], AND JAMES N. THOMPSON, in their official capacities, Appellees	:	entered March 27, 1996, at Nos. 445 and 446 C.D. 1995, reversing the Order of the Court of Common Pleas of Erie County, Pennsylvania, Civil Division, entered January 18, 1995 at No. 60059 of 1994.
	:	674 A.2d 338 (Pa. Commw. Ct. 1996)
	:	ARGUED: September 16, 1997

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: OCTOBER 21, 1998**

I agree with the majority that Sections 1(c) and 2 of the ordinance at issue must be stricken. However, because a majority of the United States Supreme Court has upheld the constitutionality of a virtually identical ordinance under the First Amendment to the Federal Constitution, and because this Court is bound by the United States Supreme Court's interpretations of the Federal Constitution, I must disagree with the majority's conclusion that the provisions of the ordinance at issue fail under the First Amendment to the Federal Constitution. Instead, I believe that the provisions of the ordinance at issue here must be stricken under Article I, § 7 of the Pennsylvania Constitution. Accordingly, I concur only in the result reached by the majority in this matter.

The United States Supreme Court case which lies at the crux of this matter is Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). In Barnes, the United States Supreme Court reviewed a statute which was, as the majority herein states, "strikingly similar" to the ordinance sub judice.[1] The critical

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[1] The ordinance in Barnes provided:

Sec. 1. (a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct;
(3) appears in a state of nudity; or
(4) fondles the genitals of another person;

commits public indeceny [sic], a Class A misdemeanor.

(b) 'Nudity' means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

The ordinance at issue in the matter sub judice is excerpted in footnote two of the Majority Opinion.

issue in Barnes was the characterization of the purpose of the statute, for if the purpose of a statute is the suppression of protected expression, then under prevailing First Amendment precedent, the strict scrutiny test applies.

According to the majority in the instant matter, there was "no point on which a majority of the Barnes Court agreed," aside from agreeing that nude dancing is expressive conduct for First Amendment purposes. Maj. Slip Op. at 10. Thus, the majority gleans that Barnes is not binding precedent on the issue of whether the ordinance sub judice can be characterized as relating to the suppression of free expression under the First Amendment. Finding no such binding precedent in Barnes, the majority proceeds to determine that the ordinance at issue here is related to the suppression of free expression, and further finds that the ordinance fails to pass constitutional muster under the strict scrutiny test. I believe that the majority herein strains to find discord in Barnes where none exists. In so doing, the majority circumvents binding United States Supreme Court precedent.

My disagreement with the majority centers on the fact that five Justices, and thus a majority, voted to uphold the ordinance in Barnes on the basis that the ordinance at issue in Barnes could not be characterized as relating to the suppression of free expression for purposes of the First Amendment.

Therefore, a five-Justice majority declined to apply the strict scrutiny test.

The plurality opinion, authored by Chief Justice Rehnquist and joined by Justices Kennedy and O'Connor, stated: ". . . the public indecency statute furthers a substantial government interest in protecting order and

morality. This interest is unrelated to the suppression of free expression." Barnes, supra, 501 U.S. at 569 (emphasis added).

In a separate concurrence, Justice Souter agreed with the majority that the statute was not aimed at the suppression of free expression, and therefore also declined to apply strict scrutiny. Id. at 586 (Souter, J., concurring) ("the [state's] interest is unrelated to the suppression of free expression") (emphasis added). Justice Souter simply disagreed with the majority as to what purpose the statute was in fact serving, believing that purpose to be the prevention of prostitution, sexual assaults and other criminal activity, rather than the general interest in morality asserted by the majority. Id.

Finally, in another separate concurrence, Justice Scalia agreed with the plurality and Justice Souter that the purpose of the statute was *not* the suppression of protected free expression. Justice Scalia wrote separately because he did not believe that the "public nudity" proscribed by the statute was entitled to any First Amendment protection at all since it was not "expressive" behavior which would fall within the protective ambit of the First Amendment. However, Justice Scalia agreed with the plurality regarding the underlying purpose of the statute:

> The purpose of the Indiana statute, as both its text and the manner of enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified. Since that is so, the dissent has no basis for positing that, where only thoroughly edified adults are present, the purpose must be

repression of communication.

Id. at 575 (Scalia, J., concurring) (emphasis added). Thus, while Justice Scalia did not entirely endorse the plurality's reasoning, he also did "not think the plurality's conclusions differ greatly from my own." Id. at 579.[2]

Thus, the basic premise upon which five Justices of the United States Supreme Court agreed is that the purpose of a statute virtually identical to the one at issue here cannot be characterized as the suppression of protected expression.[3] Accordingly, none of these five Justices believed that the strict scrutiny test was appropriate. The majority herein overlooks this fact, deems the Barnes Court "hopelessly fragmented" and discerns no binding common ground in Barnes. Consequently, the majority adopts the position of the Barnes dissenters, finds the ordinance at issue a content-based ordinance which is aimed at the suppression of protected expression and applies the strict scrutiny test. By applying the First Amendment strict scrutiny test in spite of Barnes, the majority here defies binding precedent.

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[2] Notwithstanding Justice Scalia's belief that his own concurrence did not depart significantly from the plurality's position, the majority of this Court confidently asserts that Justice Scalia arrived at his conclusion by a "t[illegible]cally different route" than that taken by the Barnes plurality. Regardless of whether Justice Scalia's concurrence is to be interpreted in accordance with Justice Scalia's clearly stated intent or interpreted as the majority herein characterizes it, the important point is that Justice Scalia, like the plurality and Justice Souter, clearly did not believe that the statute was aimed at the suppression of protected expression.

[3] The majority acknowledges that binding precedent can emanate from a fragmented Court when that Court can be said to be in agreement on a given concept. See Maj. Slip Op. at 9.

Although I believe that Sections 1 (c) and 2 of the Ordinance at issue here do not fail under the First Amendment in light of Barnes, I nevertheless concur in the result reached by the majority since I believe that those provisions must be stricken under Article I, § 7 of the Pennsylvania Constitution, which provides: ". . . The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty . . .".[sic] Pa. Const. Art. I, § 7. This Court has repeatedly determined that Article I, § 7 affords greater protection to speech and conduct in this Commonwealth than does its federal counterpart, the First Amendment. See William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 87, 173 A.2d 59, 61, cert. denied, 368 U.S. 897 (1961); Willing v. Mazzocone, 482 Pa. 377, 383, 393 A.2d 1155, 1158 (1978); Commonwealth v. Tate, 495 Pa. 158, 174, 432 A.2d 1382, 1390 (1981); Western Pennsylvania Socialist Workers v. Connecticut Gen. Life Ins., 512 Pa. 23, 37, 515 A.2d 1331, 1338 (1986); Insurance Adjustment Bureau v. Insurance Commissioner, 518 Pa. 210, 542 A.2d 1317 (1988).

I believe that the dissent authored by Justice White in Barnes is persuasive and that this Court should adopt it for purposes of interpreting Article I, § 7 of the Pennsylvania Constitution. As Justice white pointed out in Barnes, the position of the Barnes plurality -- that the purpose served by the ordinance at issue was to protect morals and public order rather than to suppress free expression -- is patently erroneous. Justice White wrote:

> The purpose of forbidding people to appear nude in parks, beaches, hot dog stands and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in

> theatres and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates.
>
> . . . .
>
> This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the state permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts or ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances cannot be pigeonholed as mere "conduct" independent of any expressive component of the dance.

Barnes, supra, 501 U.S. at 590-592 (White, J., dissenting).

Justice White's dissent forcefully articulates the position which I believe that this Court should adopt for purposes of our interpretation of Article I, § 7 of the Pennsylvania Constitution. If the purpose of the ordinance,

as the plurality and Justice Scalia believed, was merely to "enforce the traditional moral belief that people should not expose their private parts indiscriminately,"[4] then the ordinance presumably would not allow people to display indiscriminately their private parts to innumerable relatives, friends, and others whom they care to invite into their homes. Since the ordinance does not prohibit such behavior, the moral justification must be deemed illusory. The true purpose of the ordinance, as applied to appellant and others similarly situated, is to prevent the customers in appellant's and like establishments from being exposed to the distinctive communicative aspects of nude dancing. One might call this a moral justification, insofar as the drafters of the ordinance seem to be expressing their moral condemnation of those citizens of the Commonwealth who are attracted to this distinct form of communication, but lawmakers cannot invoke the sword of morality specifically to attack a form of protected expression. The fact that this particular form of protected expression may not ascend to the level of a high art form is irrelevant.[5] Lawmakers may not categorically proscribe any form of protected expression simply because they are not at ease with its content.

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[4] Barnes, supra, 501 U.S. at 575 (Scalia, J., concurring).

[5] This concept was eloquently articulated by Justice Harlan: "It is largely because government officials cannot make principled decisions in this area that the Constitution leaves matters of taste and style so largely to the individual." Cohen v. California, 403 U.S. 15, 25 (1971). Or, put another way: "While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye." Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n.3 (2d Cir. 1974), aff'd in part sub nom. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

Accordingly, for purposes of Article I, § 7 of the Pennsylvania Constitution, I believe that the strict scrutiny test is appropriately applied in this case. I concur in the majority's application of the strict scrutiny test, as well as the remainder of the majority's disposition of this case.

Mr. Justice Zappala joins this concurring opinion.